Supreme Court, U.S.
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No. 10-___

In the
Supreme Court of the United States

YANKTON SIOUX TRIBE, AND ITS INDIVIDUAL MEMBERS,

PETITIONERS,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The court of appeals held in this case that land transfers by the United States Army Corps of Engineers to the State of South Dakota pursuant to the Water Resources Development Act of 1999 did not violate §§ 605(b)(3) and (c)(1)(B) of that Act because they did not include lands within the "external boundaries" of the Yankton Sioux Reservation. The petitions and conditional cross-petition for a writ of certiorari in Nos. 10-929, 10-931, and 10-932 concern the boundaries of that reservation. The question presented is whether to hold this petition and then dispose of it as appropriate in light of the Court's disposition of those other petitions.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, respondents include Pete Geren, Secretary of Army; George S. Dunlop, Principal Deputy Assistant Secretary of the Army for Civil Works; Robert L. Van Antwerp, Chief of Engineers; David C. Press, Omaha District Commander and District Engineer; United States of America; State of South Dakota; Jeff Vonk, Secretary of the Department of Game, Fish, and Parks for the State of South Dakota; and John Does, Contractors.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASON FOR GRANTING THE PETITION 12

The Court Should Hold This Petition For The Petitions And Conditional Cross-Petition In Nos. 10-929, 10-931, and 10-932 12

CONCLUSION 15

APPENDIX

TABLE OF APPENDICES ..... App. i

Appendix A

Opinion of the United States Court of Appeals for the Eighth Circuit, dated June 12, 2010 ..... App. 1

Judgment of the United States Court of Appeals for the Eighth Circuit, dated June 12, 2010 ..... App. 12

Appendix B

Opinion of the United States District Court of South Dakota, Southern Division, Denying Plaintiffs' Motion to Alter Judgment Under Rule 60(b)(1), dated April 21, 2009.....App. 14

Appendix C

Opinion of the United States District Court of South Dakota, Southern Division, Granting Defendants' Motion for Summary Judgment, dated Mar. 31, 2008 .App. 22

Judgment of the United States District Court of South Dakota, Southern Division, dated Mar. 31, 2008.....App. 32

Appendix D

Opinion of the United States District Court of South Dakota, Southern Division, Denying In Part Defendants' Motion to Dismiss, dated Sept. 30, 2005 .....App. 34

Appendix E

Order of the United States Court of Appeals for the Eighth Circuit Denying Rehearing En Banc, dated Sept. 23, 2010 ..App. 51

TABLE OF AUTHORITIES

Cases

Solem v. Bartlett,
465 U.S. 463 (1984) 7

South Dakota v. Yankton Sioux Tribe,
522 U.S. 329 (1998) 7

South Dakota v. Yankton Sioux Tribe,
530 U.S. 1261 (2000) 8

Yankton Sioux Tribe v. Gaffey,
14 F. Supp. 2d 1135 (D.S.D. 1998) 8

Yankton Sioux Tribe v. Gaffey,
188 F.3d 1010 (8th Cir. 1999) 8

Yankton Sioux Tribe v. Podhradsky,
529 F. Supp. 2d 1040 (D.S.D. 2007) 9

Yankton Sioux Tribe v. Podhradsky,
606 F.3d 994 (8th Cir. 2010) 2, 6, 9

Statutes

25 U.S.C. § 462 6

28 U.S.C. § 1254(1) 1

Act of Aug. 15, 1894, ch. 290, art. 20, 28 Stat.
286, 319 ..... *passim*

Act of February 13, 1929, ch. 183,
45 Stat. 1167 6

General Allotment Act of 1887, ch. 119,
24 Stat. 388 4

Indian Reorganization Act of 1934, ch. 576,
48 Stat. 984 6

Pub. L. 106-462, § 106, 114 Stat. 1991 4

Pub. L. 106-541, § 540, 114 Stat. 2572 ..... 1, 3

Treaty of Apr. 19, 1858,
11 Stat. 743 4

Water Resources Development Act of 1999,
Pub. L. 106-53, 113 Stat. 269 ..... *passim*

§ 605(a) 1

§ 605(b) 2, 3, 9, 12

§ 605(c) 2, 3, 9, 12

§ 607(a) 2

Other Authorities

Report of the Yankton Indian Commission
(Mar. 31, 1893), S. Exec. Doc. No. 27 5

Exec. Order No. 2363, Apr. 20, 1916 6

Exec. Order No. 4406, Mar. 30, 1926 6

Exec. Order No. 5173, Aug. 9, 1929 6

PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals is reported at 606 F.3d 895, and reproduced at Pet. App. 1-11. The unpublished order of the court of appeals denying rehearing en banc is reproduced at Pet. App. 51.

The district court's unpublished opinion granting respondents' motion for summary judgment is reproduced at Pet. App. 22-31. The district court's unpublished decision denying petitioners' motion for relief from the judgment is reproduced at Pet. App. 14-21.

JURISDICTION

The court of appeals rendered its decision on June 2, 2010, and denied a timely petition for rehearing en banc on September 23, 2010. Pet. App. 51. On December 17, 2010, Justice Alito extended the time for filing a petition for certiorari to and including February 20, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Water Resources Development Act of 1999 ("WRDA"), Pub. L. 106-53, 113 Stat. 269, *as amended by* Pub. L. 106-541, § 540, 114 Stat. 2572 (2000), requires the United States Army Corps of Engineers to transfer fee title to certain "land and recreation areas" to the South Dakota Department of Game, Fish and Parks "for fish and wildlife purposes, or public recreation uses." WRDA § 605(a)(1).

Subsections 605(b) and 605(c), as amended, describe the land to be transferred as land that "is located outside the external boundaries of a reservation of any Indian tribe." WRDA §§ 605(b)(3), 605(c)(1)(B).

Subsection 607(a), as amended, states that:

> (a) IN GENERAL.—Nothing in this title diminishes or affects—
>
> (1) any water right of any Indian Tribe;
>
> (2) any other right of any Indian Tribe, except as specifically provided in another provision of this title;
>
> (3) any treaty right that is in effect on the date of enactment of this Act;
>
> (4) any external boundary of any Indian reservation of any Indian Tribe;
>
> (5) any authority of the State of South Dakota that relates to the protection, regulation, or management of fish, terrestrial wildlife, and cultural and archaeological resources, except as specifically provided in this title; or
>
> (6) any authority of the Secretary, the Secretary of the Interior, or the head of any other Federal agency under a law in effect on the date of enactment of this Act....

WRDA § 607(a).

STATEMENT OF THE CASE

This is a companion case to *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010), which is

the subject of three petitions for a writ of certiorari by state and local entities, as well as a conditional cross-petition by the Yankton Sioux Tribe. That case and this one turn on the same basic question: whether certain lands within the historic Yankton Sioux Reservation have lost their reservation status.

This case involves the reservation status of approximately 1,100 acres of recreational land that the United States Army Corps of Engineers ("Corps") transferred to the State of South Dakota pursuant to the Water Resources Development Act of 1999 ("WRDA"), Pub. L. 106-53, 113 Stat. 269, *as amended by* Pub. L. 106-541, § 540, 114 Stat. 2572 (2000). The WRDA specifically limits transfers to areas "outside the external boundaries of a reservation of any Indian tribe." *Id.* §§ 605(b)(3), 605(c)(1)(B);[1] *see also id.* § 607(a)(4). Because the relevant areas are all located within the original boundaries of the Yankton Sioux Reservation, the validity of the Army Corps' land transfer turns on whether the Yankton Sioux Reservation has been diminished to such an extent that it no longer includes these areas. That is the same question presented in *Podhradsky*.

In *Podhradsky*, the Tribe will file a brief in opposition explaining why this Court should deny review in that case, and thus ultimately deny this hold petition as well. But if this Court were to grant the petitions and conditional cross-petition in

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[1] The Eighth Circuit opinion refers to WRDA § 605(c)(2), which Congress redesignated as § 605(c)(1)(B) in the 2000 amendments.

Podhradsky, there would be no reason not to hold this petition. In that scenario, this Court's decision in *Podhradsky* would govern this case as well. Accordingly, the Court should hold this petition for *Podhradsky*, and then consider it in light of the Court's disposition of *Podhradsky*.

A. Historical Background

1. An 1858 Treaty between the Yankton Sioux Tribe and the United States established the original boundaries of the Yankton Sioux Reservation. *See* Treaty of Apr. 19, 1858 ("1858 Treaty"), 11 Stat. 743. The Tribe ceded to the United States over 11 million acres of its aboriginal lands, and retained 430,405 acres in what is today Charles Mix County, South Dakota, as its reservation. *See id.* at 744.

2. Three decades later, Congress changed policies in the Dawes Act or General Allotment Act of 1887, ch. 119, 24 Stat. 388, *repealed in part*, Pub. L. 106-462, § 106, 114 Stat. 1991, 2007 (2000). The Dawes Act reflected a federal policy of opening up lands for settlement, and breaking up reservations into smaller pieces, through the "allotment" of reservation parcels to individual Tribe members. The United States was to hold each allotted parcel in trust "for the sole use and benefit of the Indian [allottee]" for 25 years; after that time, the Tribe member would assume fee simple ownership of the parcel and could freely alienate it. *Id.* at 389. The Dawes Act further authorized the Executive Branch to "negotiate" with the Tribe to purchase, "in conformity with the treaty or statute under which such reservation is held," the *unallotted* portions of the reservation on "just and equitable" terms. *Id.*

The United States allotted over three-fifths of the 1858 Yankton Sioux Reservation under the Dawes Act in a patchwork of scattered, noncontiguous parcels. That left approximately two-fifths of the reservation lands — 168,000 acres — unallotted. In 1894, the United States reached an agreement with the Tribe to purchase those unallotted acres for $600,000. *See* Act of Aug. 15, 1894 ("1894 Act"), ch. 290, art. 20, 28 Stat. 286, 319. The Yankton Sioux Tribe thereby surrendered approximately 168,000 acres from its 430,405-acre reservation, leaving approximately 262,300 acres of allotted lands.

In submitting the agreement to Congress, the Commissioners who had negotiated the agreement explained that the Yankton Sioux Indians "were not selling their whole reservation, but less than two-fifths of it," and "more than three-fifths of it would remain in their possession for such cultivation and improvement as Indians will give to it." Report of the Yankton Indian Commission (Mar. 31, 1893), S. Exec. Doc. No. 27, at 13.

To that end, the 1894 Act stipulated various conditions for the sale that reflected Congress's expectation that a reservation would persist. Article VIII required the United States to set aside from white settlement 1,000 acres for "agency, schools, and other purposes" for the support of the Tribe. 28 Stat. at 316. Article XIII required the United States to guarantee to "[a]ll persons who have been allotted lands on the reservation" the "undisturbed and peaceable possession of their allotted lands." *Id.* And Article XIV prohibited Congress from "pass[ing]

any act alienating any part of these allotted lands from the Indians." *Id.* at 317.

4. By the early twentieth century, the issuance of fee patents, often well before the 25-year trust period had duly expired, "left many Indians landless." *Podhradsky*, 606 F.3d at 1000. The federal government also acknowledged that its policy of encouraging assimilation had failed in light of the Indians' "'cultural resilience.'" *Id.* at 1001. The government therefore extended, re-extended, and then permanently extended the 25-year trust periods on parcels of the Yankton Sioux Reservation held in trust. *See id.* at 1000 (citing Exec. Order No. 2363, Apr. 20, 1916; Exec. Order No. 4406, Mar. 30, 1926; Exec. Order No. 5173, Aug. 9, 1929); 25 U.S.C. § 462. In 1929, rather than open the 1,000 acres of agency reserve lands to non-Indian settlers, Congress returned the lands to the Tribe and specifically prohibited their allotment. *See* Act of February 13, 1929, ch. 183, 45 Stat. 1167.

The Indian Reorganization Act of 1934 ("IRA"), ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461 *et seq.*), extended those policies. In addition to putting an end to further allotment and extending the trust periods for outstanding allotments indefinitely, the IRA authorized the Secretary of the Interior to acquire additional lands in trust to create or add to tribal reservations. Under the IRA, the federal government has taken nearly 6,500 acres into trust for the benefit of the Yankton Sioux Tribe. *Podhradsky*, 606 F.3d at 1001.

B. Proceedings Below

1. The first of these related cases began when the Yankton Sioux Tribe, faced with imminent construction of a waste site on land within the 1858 boundaries of the reservation, sought to ensure that federal environmental protections applied to the site. This Court held that the Tribe's cession of the 168,000 acres of unallotted lands to the United States had diminished the original 1858 reservation. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 357 (1998). Because the waste site lay on ceded land, the Court concluded that it was not within the diminished reservation and therefore was not subject to federal environmental regulation. *Id.* at 340, 358.

This Court did not reach the broader question whether the 1894 Act had "disestablished" the Yankton Sioux Reservation in its entirety. *Id.* at 358. The Court noted, however, that some clauses of the 1894 Act "contradict[ed]" and "counsel[ed] against finding the reservation terminated." *Id.* at 350. Specifically, the Court pointed to Article VIII, which required the United States to reserve lands "for agency, schools, and other purposes," 28 Stat. at 316, observing that it was "'difficult to imagine'" why Congress would have reserved such agency trust lands "'if it did not anticipate that the opened area would remain part of the reservation.'" *Yankton*, 522 U.S. at 350 (quoting *Solem v. Bartlett*, 465 U.S. 463, 474 (1984)). The Court further noted that Article XVII, which prohibited the sale of liquor on ceded lands or other lands within the reservation, "signal[ed] a jurisdictional distinction between reservation and ceded land." *Id.*

2. On remand, that case was consolidated with another one in which the Tribe contended that the reservation had been diminished only by the ceding of unallotted lands to the United States for sale to non-Indians, and that the approximately 262,300 acres of non-ceded lands and agency trust lands remained part of the reservation.

The district court agreed. Based on the text and history of the 1894 Act, the court concluded that the Yankton Sioux Reservation continued to exist after 1894. *See Yankton Sioux Tribe v. Gaffey*, 14 F. Supp. 2d 1135, 1149-56, 1159 (D.S.D. 1998). The court further determined that the reservation consisted, in diminished form, of the agency trust lands and non-ceded lands within the original 1858 reservation boundaries. *Id.* at 1159.

The Eighth Circuit affirmed in part and reversed in part. *See Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1030 (8th Cir. 1999). Over the State's objections, the Eighth Circuit held that the 1894 Act did not disestablish the Yankton Sioux Reservation. *Id.* at 1027. At a bare minimum, the Eighth Circuit noted, the agency trust lands — which the United States returned to the Tribe in 1929 — remained part of the reservation. *Id.* The court of appeals held, however, that allotted lands lost reservation status if and when they were sold to non-Indians. *Id.* at 1028. Both the State and the Tribe sought certiorari, with the State maintaining its total disestablishment position and the Tribe maintaining that diminishment extended only to the lands ceded in 1894. This Court denied review. *See South Dakota v. Yankton Sioux Tribe*, 530 U.S. 1261 (2000).

3. On remand, the district court determined that approximately 37,600 acres of trust lands within the original 1858 boundaries retained reservation status, including: (1) the agency trust lands reserved to the United States in the 1894 Act, then returned to the Tribe in 1929; (2) the lands allotted to individual Indians that remain in trust today; (3) the lands additionally taken into trust under the 1934 IRA; and (4) the lands allotted to individual Indians that are no longer in trust but are still owned in fee by Tribe members. *See Yankton Sioux Tribe v. Podhradsky*, 529 F. Supp. 2d 1040, 1058 (D.S.D. 2007).

4. The same district court judge simultaneously presided over this case, in which the Tribe challenges land transfers by the U.S. Army Corps of Engineers to South Dakota under the Water Resources Development Act. *See* Pet. App. 34-50. There is no dispute that the disputed 1,100 acres of land lie within the original 1858 reservation boundaries: the 971-acre North Point Recreation Area, the 44-acre White Swan Recreation Area, and the 70-acre Spillway Recreation Area.

The Tribe argued that the lands were reservation lands and thus not subject to transfer under the WRDA, which authorizes transfer only of lands "outside the external boundaries" of Indian reservations. WRDA §§ 605(b)(3), 605(c)(1)(B); *see also id.* § 607(a)(4). Both the United States and South Dakota took the position that, under the Eighth Circuit's decision in *Gaffey*, the lands at issue were outside the diminished reservation. State CA8 Br. 41-43; U.S. CA8 Br. 18-20. The United States emphasized, however, that in its view "*Gaffey* was

wrongly decided to the extent it held the reservation was diminished beyond the 1894 cession of land." U.S. CA8 Br. 9 n.4. The United States "reserv[ed] its right to seek en banc or Supreme Court review in *Gaffey/Podhradsky*." *Id.*

When the district court issued its *Podhradsky* decision, it requested supplemental briefing on whether that decision controlled the disposition of this case. *See* Pet. App. 23. Following that briefing, the district court granted summary judgment against the Tribe on the ground that "*Podhradsky* eliminates any possibility that the Tribe can prevail ... in this lawsuit." *Id.* at 29. The court explained that none of the Corps-transferred lands fell within any of the categories of land that, under *Podhradsky*, "continue to fall within the" reservation. *Id.*

5. On appeal, the Eighth Circuit held this case for *Podhradsky*, largely affirmed the district court's *Podhradsky* opinion, and then affirmed the district court's decision in this case based on its decision in *Podhradsky*. *See id.* at 2; *Podhradsky*, 606 F.3d at 1017. In *Podhradsky*, the Eighth Circuit agreed with the district court that the diminished reservation includes (1) the agency trust lands, (2) the allotted lands that remain in trust, and (3) the lands taken into trust under the 1934 IRA. 606 F.3d at 1017. The court of appeals vacated the district court's holding that the reservation also includes allotted lands that are owned in fee by Indians but not held in trust, reasoning that the lack of a "fully developed record" on such lands meant the issue was not ripe for review. *Id.* at 1015.

In this case, the Eighth Circuit then issued a short opinion affirming the district court's grant of summary judgment against the Tribe. *See* Pet. App. 1-11. The Eighth Circuit declined to delve into the parties' "core positions" — the State's argument that the reservation was wholly disestablished, and the Tribe's argument that the reservation was diminished only by the ceded lands — because "[w]e rejected those contentions in *Podhradsky*." *Id.* at 5-6. Because most of the lands at issue passed out of trust into private non-Indian hands before the Corps acquired them, the court determined that those parcels were outside the reservation's diminished boundaries at all relevant times under its decisions in *Gaffey* and *Podhradsky*. *Id.* at 7. As for the few tracts still in trust at the time the Corps acquired them, the Eighth Circuit stated that the Corps' acquisition deprived them of reservation status in the same way that acquisition of lands by any other non-Indians would deprive them of that status under *Gaffey* and *Podhradsky*. *Id.* at 9.

6. In *Podhradsky*, the State defendants, County defendants, and Southern Missouri Recycling and Waste Management District filed petitions for certiorari seeking review of the question whether the 1894 Act wholly disestablished the Yankton Sioux Reservation (Nos. 10-929, 10-931, and 10-932). The Tribe opposes those petitions, but has filed a conditional cross-petition noting that if this Court were to grant review, it should also consider the Tribe's position that the reservation has been diminished only by the ceding of unallotted lands for sale to non-Indians in 1894.

REASON FOR GRANTING THE PETITION

THE COURT SHOULD HOLD THIS PETITION FOR THE PETITIONS AND CONDITIONAL CROSS-PETITION IN NOS. 10-929, 10-931, AND 10-932.

The Eighth Circuit "deferred [its] ruling" in this case "pending disposition of [*Podhradsky*]," and then held that this case is controlled by *Podhradsky*. Pet. App. 2; *see also, e.g., id.* ("We now follow our recent decision in *Yankton Sioux Tribe v. Podhradsky* ... and affirm."); *id.* at 5 ("[A]pplying the diminished Reservation boundaries adopted in *Podhradsky*, we affirm."); *id.* at 6 (*Podhradsky* "is final ... and binding on our panel"). The district court and the respondents have likewise acknowledged that this case and *Podhradsky* are inextricably intertwined, and that *Podhradsky* is the lead case involving the core issues. Accordingly, this Court should follow the Eighth Circuit's lead by holding this petition for *Podhradsky*, and then disposing of it in light of the Court's disposition of the petitions and conditional cross-petition in *Podhradsky*.

1. The Water Resources Development Act of 1999 ("WRDA"), Pub. L. 106-53, 113 Stat. 269, *as amended by* Pub. L. 106-541, § 540, 114 Stat. 2572 (2000), limited the Corps' authority to transfer recreation areas to those areas "located outside the external boundaries of a reservation of any Indian Tribe." *Id.* §§ 605(b)(3), 605(c)(1)(B); *see also id.* § 607(a)(4).

As the Eighth Circuit explained, the lands at stake are "within the 1858 Reservation boundaries," but were allotted and "sold to non-Indians." Pet.

App. 6. Because "*Podhradsky* held that the Reservation now consists of allotted land that remained in trust and other trust lands, but *does not include allotted land that passed out of Indian hands*," the Eighth Circuit concluded that none of the lands at issue in this case were within the Reservation's boundaries at the time the Army Corps transferred them to the State. *Id.* at 7 (emphasis added).

The Eighth Circuit explained that most of the lands had passed into private, non-Indian hands before the Corps acquired them, and were thus squarely controlled by *Podhradsky*. *Id.* The Eighth Circuit also noted that the United States had held a few of the other tracts in trust for the benefit of allottees at the time that the Army Corps acquired them in condemnation proceedings approximately 60 years ago, before Congress enacted the WRDA. *Id.* at 7-8. Again referring to its rationale in *Podhradsky*, the court concluded that, because transfer into the hands of the United States for unrelated purposes is passage out of trust, the lands' transfer to the Corps diminished the Reservation under the rationale of *Podhradsky*. *Id.*; *see also id.* at 10 (explaining that "the transfer from Indian ownership diminished the Reservation, regardless of the identity of the transferee").

2. The district court and the respondents have likewise emphasized that the correct disposition of this case turns on *Podhradsky*. Simultaneous with the issuance of its *Podhradsky* opinion in December 2007, the district court ordered the parties to file briefs and supporting materials on the question whether the decision in *Podhradsky* controlled this

case. *Id.* at 23. The court then ruled that "*Podhradsky* eliminates any possibility that the Tribe can prevail ... in this lawsuit." *Id.* at 29.

The respondents also devoted near-singular attention to the implications of *Podhradsky* and the Eighth Circuit's earlier *Gaffey* decision. *See* State CA8 Br. 36 ("Under *Gaffey* and *Podhradsky*, the answer [to the validity of the Corps' land transfers] is simple."); U.S. CA8 Br. 36 (stating that "the transferred land left Indian hands and is subject to the holding in *Gaffey*," but that *Gaffey* was wrongly decided).

Indeed, the United States filed a motion — supported by the State — to hold this case in abeyance in the Eighth Circuit because "the ultimate disposition of *Podhradsky* may affect the outcome of this case." U.S. Motion for Abeyance at 5, dated Sept. 2, 2009; *see also* Letter from State, dated Sept. 8, 2009 (supporting U.S. Motion). The State similarly indicated in an August 28, 2009, letter that it would likely seek rehearing en banc in *Podhradsky* and the appeal in this case should be held in abeyance pending that petition. As noted above, the Eighth Circuit agreed insofar as it "deferred [its] ruling pending disposition of" *Podhradsky*. Pet. App. 2. There is no reason for this Court to take a different approach.

CONCLUSION

This Court should hold the petition and dispose of it in accordance with this Court's disposition of the petitions and conditional cross-petition in Nos. 10-929, 10-931, and 10-932.

Respectfully submitted,

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February 22, 2011

TABLE OF APPENDICES

Page

Appendix A

Opinion of the United States Court of Appeals for the Eighth Circuit, dated June 12, 2010 ..... App. 1

Judgment of the United States Court of Appeals for the Eighth Circuit, dated June 12, 2010 ..... App. 12

Appendix B

Opinion of the United States District Court of South Dakota, Southern Division, Denying Plaintiffs' Motion to Alter Judgment Under Rule 60(b)(1), dated April 21, 2009 ..... App. 14

Appendix C

Opinion of the United States District Court of South Dakota, Southern Division, Granting Defendants' Motion for Summary Judgment, dated Mar. 31, 2008 ..... App. 22

Judgment of the United States District Court of South Dakota, Southern Division, dated Mar. 31, 2008 ..... App. 32

Appendix D

Opinion of the United States District Court of South Dakota, Southern Division, Denying In Part Defendants' Motion to Dismiss, dated Sept. 30, 2005 ..... App. 34

Appendix E

Order of the United States Court of Appeals for the Eighth Circuit Denying Rehearing En Banc, dated Sept. 23, 2010 ..... App. 51

Appendix A

606 F.3d 895

United States Court of Appeals,
Eighth Circuit.

YANKTON SIOUX TRIBE, Plaintiff-Appellant,
v.
UNITED STATES ARMY CORPS
OF ENGINEERS, et al., Defendants-Appellees.
No. 08-2255.

Submitted: May 12, 2009.
Filed: June 2, 2010.

Rehearing and Rehearing En Banc
Denied Sept. 23, 2010.

Attorneys and Law Firms

Rebecca L. Kidder, argued, Charles Abourezk, on the brief, Rapid City, SD, for appellant.

John P. Guhin, AAG, Pierre, SD, and Mark E. Salter, AUSA, argued, Sioux Falls, SD, Jan Leslie Holmgren, AUSA, Sioux Falls, SD., Meghan N. Dilges, AAG, Pierre, SD, on the brief, for appellees.

Before LOKEN, Chief Judge,* BYE, Circuit Judge, and MILLER,** District Judge.

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* The Honorable James B. Loken stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the close of business on March 31, 2010. He has been succeeded by the Honorable William Jay Riley.

** The Honorable Brian Stacy Miller, United States District Judge for the Eastern District of Arkansas, sitting by designation.

Opinion

LOKEN, Chief Judge.

An 1858 treaty between the United States and the Yankton Sioux Tribe of Native Americans established the Yankton Sioux Reservation (the "Reservation"), comprising approximately 430,000 acres in what is now Charles Mix County, South Dakota, bounded on the south and west by the Missouri River. This appeal attacks the validity of land transfers by the U.S. Army Corps of Engineers to the State of South Dakota. It is resolved by our determination of the current boundaries of the Reservation. We deferred our ruling pending disposition of another appeal involving a different aspect of the long-standing dispute over the Reservation. We now follow our recent decision in *Yankton Sioux Tribe v. Podhradsky,* 606 F.3d 994, 2010 WL 1791365 (8th Cir. May 6, 2010) (*Podhradsky*), and affirm.

I.

Implementing the Dawes Act of 1887, federal agents "allotted" a substantial portion of the Reservation to individual tribal members in noncontiguous parcels. In 1892, federal Commissioners negotiated an agreement, ratified by Congress in 1894, whereby the Tribe ceded (transferred) 170,000 unallotted acres to the United States as surplus lands. Act of August 15, 1894, ch. 290, 28 Stat. 286 ("the 1894 Act"). As the 1892 agreement contemplated, the United States sold

nearly all of the ceded lands, which were interspersed with allotted lands, to non-Indian settlers.

In *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998), the Supreme Court held that the Reservation was diminished by the lands ceded to the United States under the 1894 Act. However, the Court declined to determine whether Congress disestablished the Reservation altogether and remanded the case for further proceedings. *Id.* at 358, 118 S.Ct. 789. Since then, the remaining issues have been litigated in two separate lawsuits before District Judge Lawrence Piersol in the District of South Dakota and in multiple appeals to this court.

The lead case concerned the jurisdiction of the Tribe, the State of South Dakota, and the United States over non-ceded lands within the Reservation's original 1858 boundaries. Initially, we rejected the State's contention that the Reservation was disestablished by the 1894 Act, but we held that the Reservation was further diminished when allotted lands passed out of Indian ownership. *Yankton Sioux Tribe v. Gaffey,* 188 F.3d 1010 (8th Cir.1999) ("*Gaffey*"), *cert. denied,* 530 U.S. 1261, 120 S.Ct. 2717, 147 L.Ed.2d 982 (2000), *rev'g in part* 14 F.Supp.2d 1135, 1159-60 (D.S.D.1998). We remanded, instructing the district court to determine what categories of land comprised the diminished Reservation. Resolving appeals from that ruling, we recently held that the diminished Reservation consists of allotted lands that remain in trust, additional lands taken into trust,

and ceded lands reserved by the 1894 Act ("agency trust lands"). *Podhradsky,* 2010 WL 1791365 at * 20, 606 F.3d at 1016-17, *rev'g in part* 529 F.Supp.2d 1040 (D.S.D.2007). The interested reader is referred to these opinions for a thorough review of the complex history and legal issues surrounding this critical part of the broad dispute.

This appeal concerns the second case arising out of the broad controversy. In the Flood Control Act of 1944, 58 Stat. 887, Congress authorized the Corps to construct dams along the Missouri River. The Corps acquired lands for this vast project by condemnation and purchase, including lands within the 1858 boundaries of the Reservation. In Title VI of the Water Resources Development Act of 1999, Congress directed the Corps to transfer to the State of South Dakota for fish and wildlife or public recreation uses specified lands "located outside the external boundaries of a reservation of any Indian Tribe" that the Corps had acquired to implement the Pick-Sloan Missouri River Basin project.[1] In this action, the Tribe seeks to nullify the sale to the State of recreation areas the Corps initially acquired for the Fort Randall Dam project in south-central South Dakota – the 971-acre North Point Recreation Area and the 44-acre White Swan Recreation Area – and the lease of the 70-acre Spillway Recreation Area. The Tribe argues

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[1] Pub.L. No. 106-53, 113 Stat. 269, 391 §§ 605(b)(3), (c)(2) (1999), *as amended by* Pub.L. No. 106-541, § 540(h)(4), 114 Stat. 2572, 2670 (2000). These statutes have never been codified.

that these lands are within "the external boundaries" of the Reservation and are therefore barred from being transferred by §§ 605(b)(3) and (c)(2) of the WRDA, as amended.[2]

After first resolving the issue we remanded in *Podhradsky,* Judge Piersol granted summary judgment for the Corps and State. Noting the Tribe admitted that the Corps held title to the lands in question prior to enactment of the WRDA, Judge Piersol concluded that the lands here at issue do not fall within any of the categories of land which he determined in *Podhradsky* "continue to fall within the exterior boundaries of the checkerboard Yankton Sioux Reservation." *Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs,* No. 02-4126, 2008 WL 895830 at *3 (D.S.D. Mar.31, 2008). The Tribe appeals. Reviewing the grant of summary judgment *de novo,* and applying the diminished Reservation boundaries adopted in *Podhradsky,* we affirm.

II.

Because this appeal was briefed and argued with the cross appeals pending in *Podhradsky,* the parties have understandably reiterated their core positions in

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[2] We note that, in the 2000 WRDA, Congress amended § 605(d)(2)(B)(i)(II)(cc) to specifically direct the Corps to lease the Spillway Recreation Area to the State. 114 Stat. at 2666. Given our broader rejection of the Tribe's claims, we need not address whether this amendment foreclosed the specific Spillway claim.

that case, namely, the Tribe's contention that the Reservation was diminished only by the sales of surplus lands ceded by the 1894 Act (as the Supreme Court held in *Yankton Sioux Tribe*), and the State's contrary contention that the Reservation was altogether disestablished by the 1894 Act. We rejected those contentions in *Podhradsky*. That decision is final (subject only to further review by this court or the Supreme Court) and binding on our panel. Therefore, we will discuss in this opinion only those issues raised by the Tribe that were not presented to and decided by the court in *Podhradsky*.

1. The North Point, White Swan, and Spillway recreation areas here at issue consist of lands within the 1858 Reservation boundaries that were subsequently allotted to individual members of the Tribe.[3] Most parcels were then fee patented to allottees or their heirs and assigns and sold to non-Indians. *Podhradsky* held that the Reservation now consists of allotted land that remained in trust and other trust lands, but does not include allotted land that passed out of Indian hands. 2010 WL 1791365, at *20, 606 F.3d at 1016-17, applying *Gaffey*, 188 F.3d at 1030.[4]

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[3] Apparently, one 40-acre parcel was part of the lands ceded to the United States by the 1894 Act, in which case it is clearly outside the diminished Reservation.

[4] Typically, a reservation is diminished when a contiguous piece is carved out; while non-Indians may acquire title to land in the remainder, its reservation status does not change. *See Solem v. Bartlett*, 465 U.S. 463, 470-71, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984). In *Gaffey*, however, we concluded that

(Continued on following page)

Thus, these fee-patented parcels were outside the Reservation's diminished boundaries *when the Corps acquired them.* The Tribe argues that *Podhradsky* decided only the jurisdictional status of these lands; they remain part of the Reservation because the Corps acquired the lands under the Flood Control Act of 1944, and we held in *Lower Brule Sioux Tribe v. South Dakota,* 711 F.2d 809, 813 (8th Cir.1983), that the Flood Control Act did not authorize the diminishment of any reservation. However, as the district court recognized, the diminishment here did not result from Flood Control Act acquisitions. Rather, by reason of the 1894 Act as construed in *Gaffey,* these fee-patented lands were outside the "external boundaries" of the Reservation before they were acquired by the Corps. Therefore, the Corps' subsequent transfer of these lands to the State did not violate §§ 605(b)(3) and (c)(2) of the WRDA.

The Tribe also contends that summary judgment was inappropriate because there are material issues of fact whether the Corps acquired some tracts of allotted lands from non-Indians whose titles derived from fee patents that were forced upon tribal members. Though presented as a diminishment issue, this is in fact a time-barred collateral attack on the validity of the titles the Corps acquired some sixty years ago. *See Nichols v. Rysavy,* 809 F.2d 1317 (8th

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Congress intended the Reservation to be further diminished "by the loss of those lands originally allotted to tribal members which have passed out of Indian hands." 188 F.3d at 1030.

Cir.), *cert. denied,* 484 U.S. 848, 108 S.Ct. 147, 98 L.Ed.2d 103 (1987). These lands were not within the Reservation when they were acquired for flood control purposes, nor when the Corps transferred them to the State.

2. A few tracts in the North Point and White Swan recreation areas were allotted land still held in trust for the benefit of allottees when they were acquired by the Corps in condemnation proceedings some sixty years ago. The record reflects that the Corps commenced condemnation proceedings in the District of South Dakota; the Bureau of Indian Affairs did not oppose condemnation but negotiated appropriate compensation for the Indian allottees; each allottee signed a Consent to Transfer of Lands acknowledging that, in exchange for specified compensation, "absolute fee title will be conveyed to the United States of America for the benefit of the War Department by court decree;" the district court then entered final condemnation orders; and the Attorney General provided the Secretary of the Army a letter opining that "valid title to the above tract is vested in the United States of America in fee simple." The Tribe concedes that the United States held fee simple title to these tracts when the WRDA was enacted and when the Corps transferred them to the State. *See Cherokee Nation v. Southern Kansas Ry. Co.,* 135 U.S. 641, 656-657, 10 S.Ct. 965, 34 L.Ed. 295 (1890) (United States may use its eminent domain powers to take Indian lands); 25 U.S.C. §§ 341, 357. Moreover, any

challenge to the takings would be time-barred. *See* 28 U.S.C. § 2401.

In *Podhradsky,* we held that allotments continuously held in trust for the benefit of the tribe or its members are part of the diminished Reservation. 2010 WL 1791365 at * 13, 606 F.3d at 1009-10. However, we held in *Gaffey* that the Reservation was diminished "by the loss of those lands originally allotted to tribal members which have passed out of Indian hands." 188 F.3d at 1030. The Tribe argues that the district court erred in applying this ruling to the Corps' acquisition of such lands because Congress only "intended to diminish the reservation by . . . land which it foresaw would pass into the hands of white settlers and homesteaders," *id.* at 1028, not to the United States.

This argument is without merit. First, the holding in *Gaffey,* which is binding on our panel, is not so limited. Second, a member of the Tribe who had a beneficial interest in allotted land still held in trust exchanged that interest for compensation when the land was acquired by the Corps in a condemnation proceeding, just as the same interest was surrendered by an allottee who took a fee patent and sold allotted land to a non-Indian.[5] Third, the Corps' use of the

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[5] The record reflects that individual tribal members were initially paid a total of $121,210 as compensation for the takings. In 1954, Congress authorized a payment of $106,500 "for the purpose of relocating the members of the Yankton Sioux Tribe, South Dakota, who reside or have resided, on tribal and

(Continued on following page)

acquired land to build a dam and reservoir, which required the relocation of eight percent of the Tribe's population, was fundamentally inconsistent with the concept of a reservation – "land set aside under federal protection for the residence or use of tribal Indians." *Cohen's Handbook of Federal Indian Law* § 3.04[2][c][ii], at 189 (2005 ed.). Our decision in *Gaffey* was that the transfer from Indian ownership diminished the Reservation, regardless of the identity of the transferee. Therefore, allotted lands still held in trust became lands "located outside the external boundaries" of the Reservation when fee simple title was acquired by the Corps for the Fort Randall Dam project.[6]

III.

Finally, the Tribe appeals the district court's denial of its motion to disqualify the Department of

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allotted lands acquired by the United States for the Fort Randall Dam and Reservoir project." 43 U.S.C.A. § 1200e. In 2002, Congress placed an additional $23 million in a trust fund as compensation for the dam project. Yankton Sioux and Santee Sioux Tribes Equitable Compensation Act, Pub.L. No. 107-331, 116 Stat. 2834, 2838-2843 (2002)

[6] The Tribe also asserts that there may have been allotted land acquired by the Corps that had been continuously held in fee by tribal members, rather than non-Indians. Our decision in *Podhradsky* left open the Reservation status of lands falling in this category. 2010 WL 1791365 at *18, 606 F.3d at 1014-15. Without question, however, the Corps acquired fee title to these lands well before enactment of the WRDA.

Justice from representing the Corps. The Tribe filed this motion in May 2007, almost five years after commencement of the suit, arguing that the Department should not represent the Corps in this case because its attorneys, representing the United States in its capacity as trustee, sided with the Tribe in the *Gaffey/Podhradsky* litigation. The Tribe cites no authority for the proposition that the Attorney General may be disqualified from performing his statutory duty of representing another department of the United States in federal court. 28 U.S.C. § 516. The district court did not abuse its discretion in denying this untimely motion. *See Droste v. Julien,* 477 F.3d 1030, 1035 (8th Cir.2007) (standard of review).

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 08-2255

Yankton Sioux Tribe, and its individual members,

Plaintiff-Appellant

v.

United States Army Corps of Engineers; Pete Geren, Secretary of the Army; George S. Dunlop, Principal Deputy Assistant Secretary of the Army for Civil Works; Robert L. Van Antwerp, Chief of Engineers; David C. Press, Omaha District Commander and District Engineer; United States of America; State of South Dakota; Jeff Vonk, Secretary of the Department of Game, Fish and Parks for the State of South Dakota; John Does, Contractors,

Defendants-Appellees

Appeal from U.S. District Court for the
District of South Dakota – Sioux Falls
(4:02-cv-04126-LLP)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

June 02, 2010

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.
/s/ Michael E. Gans

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

* *

YANKTON SIOUX TRIBE, and its individual members, Plaintiffs, vs. UNITED STATES ARMY CORPS OF ENGINEERS; PETE GEREN, Secretary of the Army; GEORGE S. DUNLOP, Principal Deputy Assistant Secretary of the Army for Civil Works; ROBERT L. ANTWERP, Chief of Engineers; DAVID C. PRESS, Omaha District Commander and District Engineer; THE UNITED STATES OF AMERICA; THE STATE OF SOUTH DAKOTA; JEFF VONK, Secretary of the Department of Game, Fish and Parks for the State of South Dakota; and JOHN DOES, Contractors, Defendants.	*	CIV 02-4126 MEMORANDUM OPINION AND ORDER DENYING PLAINTIFFS' MOTION TO ALTER JUDGMENT UNDER RULE 60(b)(1) (Filed Apr. 21, 2009)

* *

Title to the real property in question was granted to the United States through condemnation actions in this Court over 50 years ago. Plaintiffs presently

challenge the proceedings and the title that is now vested in the United States by virtue of a Motion for Relief from Judgment under Rule 60(b)(1) of the Federal Rules of Civil Procedure, The challenge is to the substance of this Court's Memorandum Opinion and Order and Judgment of March 31, 2008.

Title to the real property in question was granted to the United States through sales and in other instances through condemnation actions in this Court over 50 years ago. It has not been shown that there were any challenges to the legality of the takings and there has been no showing of any appeals from the condemnation judgments of this Court.

Plaintiffs cannot challenge the proceedings and the resulting title that now is vested in the United States by virtue of a 60(b) Motion. Plaintiffs or their predecessors could have challenged the taking by objecting at trial and appealing from the condemnation proceedings. In *United States v. Herring,* 750 F.2d 669, 671 (8th Cir. 1984), the court stated that in cases where an issue concerning the statutory validity of the taking arises, the government is considered to have taken only a defeasible title and a party may challenge the validity of the taking on appeal. However, once the time for appeal has expired, title to the land becomes 'indefeasible' and is only subject to challenge pursuant to the Quiet Title Act of 1972, 28

U.S.C. § 2409a(a)[1]. *Id.* (stating that "title was 'defeasible' until final judgment only to the extent that it was subject to challenge by the then existing landowner as a wrongful taking."); *Block v. North Dakota,* 461 U.S. 273, 286, 103 S.Ct. 1811, 1819, 75 L.Ed.2d 840 (1983) ("Congress intended the [Quiet Title Act] to provide the exclusive means by which adverse claimants could challenge the United States' title to real property."). Because Plaintiffs or their predecessors failed to bring this action within the 12-year statute of limitations provision governing Quiet Title

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[1] The Court notes that while the language of the Quiet Title Act states that it "does not apply to trust or restricted Indian lands," the United States Supreme Court has stated that this exclusion "operates solely to retain the United States' immunity from suit by third parties challenging the United States' title to land held in trust for Indians. . . . Thus, when the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the Government's immunity." *United States v. Mottaz,* 476 U.S. 834, 842-43, 106 S.Ct. 2224, 90 L.Ed.2d 841 (1986). In *Mottaz,* the Court found that because the United States was claiming an interest in the disputed lands not on behalf of Indian beneficiaries of a trust, but rather on behalf of the United States Forest Service and the Chippewa National Forest, the Court held the Quiet Title Act was the exclusive vehicle by which the plaintiff could judicially challenge the title of the United States to the real property in question. *Id.* at 843.

In the present case, because the United States condemned the land in question not on behalf of Indian beneficiaries of a trust, but rather for its own purposes to build a dam, Plaintiffs' claims, like those of the plaintiff in *Mottaz,* are governed by the Quiet Title Act.

Act claims, 28 U.S.C. § 2409a(g), any action under that Act is now time barred.

Legal title was vested with the United States even though the Court concludes there was never condemnation authority provided to the Army Corps of Engineers by Congress for the acquisition by condemnation of lands at issue in this case, As stated by the Eighth Circuit in *Lower Brule Sioux Tribe v. South Dakota,* 711 F.2d 809, 813 (8th Cir. 1983) and in *United States v. Winnebago Tribe of Nebraska,* 542 F.2d 1002, 1006 (8th Cir. 1976), the Flood Control Act of 1944, Pub.L. No. 78-534, 58 Stat. 887 (1944), did not authorize the acquisition of Indian property. However, Congress, as recognized by the court in *Lower Brule,* passed seven subsequent statutes which authorized limited takings of Indian lands for specific hydroelectric and flood control dams on the Missouri River in North and South Dakota.[2] The Court finds, however, in examining these seven statutes, that none regard the lands in question in the present case.

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[2] The seven taking statutes passed by Congress in order to construct the dams within the Missouri River Basin Project were the Fort Berthold Garrison Act, Pub.L. No. 81-437, 63 Stat. 1026 (1949); Cheyenne River Oahe Act, Pub.L. No. 83-776, 68 Stat, 1191 (1954); Standing Rock Oahe Act, Pub.L. No. 85-915, 72 Stat. 1762 (1958); Fort Randall (Crow Creek) Act, Pub.L. No. 85-916, 72 Stat. 1766 (1958); Fort Randall (Lower Brule) Act, Pub.L. No. 85-923, 72 Stat. 1773 (1958); Big Bend (Lower Brule) Act, Pub.L. No. 87-734, 76 Stat. 698 (1962); and Big Bend (Crow Creek) Act, Pub.L. No. 87-735, 76 Stat. 704 (1962). *Lower Brule Sioux Tribe v. South Dakota,* 711 F.2d 809, 813 n.1 (8th Cir. 1983).

In addition, the Court found no other statutes authorizing the takings by condemnation of the lands in this case. The other authorities listed in Table 4[3] of the report by Army Corps of Engineers' expert, James Muhn, which were cited in the condemnation filings and district court judgments for the condemned lands, do not show, as required in *Winnebago,* 542 F.2d at 1006, the clear intent of Congress to take the tribal lands at issue by eminent domain. Additionally, the Court examined the language of the Act of July 6, 1954, Pub.L. No. 83-478, 68 Stat. 452, and found that it also did not authorize the takings of the Indian lands in question, but rather served to assist the families that had already been displaced as a result of the condemnation proceedings.

Accordingly, despite the fact that neither the Army Corps of Engineers nor any other part of the United States government ever received authorization from Congress to condemn the lands in question, the Court finds that the time for which the Tribe or any of its members or their predecessors may challenge the legality of these takings has expired. As explained above, aside from the question of the validity of the 60(b) motion, in *United States v. Herring,*

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[3] Act of April 24, 1888, 25 Stat. 94; Act of March 1, 1917, 39 Stat. 948; Act of July 16, 1918, 40 Stat. 904; Act of February 26, 1931, 46 Stat. 1421; Act of August 18, 1941, 55 Stat. 638; Act of December 22, 1944, Pub.L. 78-534, 58 Stat. 887; Act of May 2, 1946, Pub.L. 79-274, 60 Stat. 160; Act of July 31, 1947, Pub.L. 80-296, 61 Stat. 686; Act of June 25, 1948, Pub.L. 80-782, 62 Stat. 1019.

750 F.2d 669, 671 (8th Cir. 1984), the court stated that in cases where an issue concerning the statutory validity of the taking arises, the government is considered to have taken only a defeasible title and a party may challenge the validity of the taking on appeal. However, once the time for appeal has expired, title to the land becomes 'indefeasible' and is only subject to challenge pursuant to the Quiet Title Act of 1972, 28 U.S.C. § 2409a(a). There is no evidence in the record that Plaintiffs or their predecessors challenged or appealed the legality of the condemnation proceedings which vested, over 50 years ago, title to the real property in question in the United States. Accordingly, under *United States v. Herring,* 750 F.2d 669 (8th Cir. 1984) and *Block v. North Dakota,* 461 U.S. 273, 103 S.Ct, 1811, 75 L.Ed.2d 840 (1983), title to the land is only subject to challenge pursuant to the Quiet Title Act. Because Plaintiffs or their predecessors failed to bring a challenge within the 12-year statute of limitations provision governing Quiet Title Act claims, 28 U.S.C. § 2409a(g), any challenge to legal title having vested in the United States is time barred.

The conclusiveness of the condemnation proceedings only applies to title to real property. Under the teachings of *Lower Brule Sioux Tribe v. South Dakota,* 711 F.2d 809 (8th Cir. 1983) and *South Dakota v. Bourland,* 949 F.2d 984 (8th Cir. 1991), *rev'd on other grounds, South Dakota v. Bourland,* 508 U.S. 679, 113 S.Ct. 2309, 124 L.Ed.2d 606 (1993) (citing *Lower Brule*), the condemnation proceedings did not and

could not affect reservation boundaries, Any indication to the contrary in the Memorandum Opinion and Order of March 31, 2008, is corrected by this acknowledgment. The result after that acknowledgment is, however, the same. The decision in the companion case, *Yankton Sioux Tribe v. Gaffey,* No. 98-4042 (D.S.D. filed Dec. 19, 2007), finally and fully determined the boundaries of the Yankton Sioux Reservation. (*See also* Ex. 12, the map which designates the reservation areas.)[4] The real property in question here was not a part of the checkerboard boundaries of the Yankton Sioux Reservation, That case, which is now on appeal, was fully litigated with all parties being represented by counsel. The Plaintiff Yankton Sioux Tribe urged a far larger reservation than was the result. That result cannot be re-litigated here by a 60(b) motion. Before the decision in the present case, the parties in the present case were asked to comment to the Court on the impact of the Gaffey decision upon the present case.

The real estate at issue in the present case was also under consideration for purposes of Yankton Sioux reservation exterior boundary determinations in *Yankton Sioux Tribe v. Gaffey,* 14 F.Supp.2d 1135, 1159 (D.S.D. 1998), *rev'd on other grounds, Yankton Sioux Tribe v. Gaffey,* 188 F.3d 1010 (8th Cir. 1999). The result in the present case is the same as

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[4] The map is approximately 38 inches by 48.5 inches and because of its size and composition, smaller copies were sent as a part of the appeal record.

previously ruled on in *Yankton Sioux Tribe v. Gaffey*, No. 98-4042 (D.S.D. filed Dec. 19, 2007) and Doc. 427 in that real estate which is at issue in the present lawsuit is not within the checkerboard reservation which is what remains of the Yankton Sioux Reservation. All parties were represented in that litigation which determined reservation boundaries, and not legal title.

There were other claims raised in the 60(b) motion which are simply not part of the remaining claims in the Third Amended Complaint and are not properly the subject of a 60(b) motion.

For the foregoing reasons, it is hereby ORDERED that Plaintiffs' Motion to Alter Judgment, Doc. 356, be DENIED.

Dated this 21st day of April, 2009.

BY THE COURT:

/s/ Lawrence L. Piersol
Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: /s/ Shelly Margulies
Deputy

Appendix C

2008 WL 895830

United States District Court,
D. South Dakota,
Southern Division.

YANKTON SIOUX TRIBE, and its
individual members, Plaintiffs,
v.
UNITED STATES ARMY CORPS OF ENGINEERS;
Pete Geren, Secretary of the Army; George S. Dunlop,
Principal Deputy Assistant Secretary of the Army
for Civil Works; Robert L. Antwerp, Chief of
Engineers; David C. Press, Omaha District
Commander and District Engineer; The United
States of America; The State of South Dakota;
Jeff Vonk, Secretary of the Department of Game,
Fish and Parks for the State of South Dakota;
and John Does, Contractors, Defendants.

No. CIV 02-4126.
March 31, 2008.

Attorneys and Law Firms

Charles T. Abourezk, Abourezk & Zephier, PC, Rapid City, SD, Mario Gonzalez, Oglala Sioux Tribe, Rapid City, SD, for Plaintiff.

Jan L. Holmgren, U.S. Attorney's Office, Sioux Falls, SD, for Federal Defendants.

Charles D. McGuigan, John P. Guhin, Meghan N. Dilges, Attorney General of South Dakota, Pierre, SD, for State Defendants.

Opinion

MEMORANDUM OPINION AND ORDER

LAWRENCE L. PIERSOL, District Judge.

All parties filed summary judgment motions. (Docs. 284, 288 and 292.) The motions have been fully briefed and the Court heard oral argument on the motions on October 9, 2007. During the hearing, the Court advised the parties that the summary judgment motions would be taken under advisement and the trial date would be cancelled. The Court also ordered supplemental briefing on the Plaintiffs' claim regarding the Visitor's Center. Following the issuance of a Memorandum Opinion and Order on December 19, 2007, in a related case, *Yankton Sioux Tribe v. Podhradsky,* CIV 98-4042 (D.S.D.), the Court allowed the parties in this case an opportunity to explain their views on whether the Court's decision in CIV 98-4042 affects the pending summary judgment motions. For the reasons set forth below the Plaintiffs' motion will be denied, the United States Army Corps of Engineers ("the Corps"), Pete Green, George Dunlop, Robert Antwerp, David Press, The United States of America's ("the Federal Defendants") summary judgment motion will be granted, and the State of South Dakota, and Jeff Vonk's ("the State Defendants") summary judgment motion will be granted.

I. BACKGROUND

The original Complaint in this action contained two distinct types of claims: one alleging violations of

the Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. § 3001 *et seq.*, involving the inadvertent discovery of human remains; and one involving the transfer of lands from the United States Government to the State of South Dakota pursuant to Title VI of the Water Resources Development Act ("WRDA"), Pub.L. No. 106-53, 113 Stat. 269 (1999), as amended by Pub.L. No. 106-541, § 540,114 Stat. 2572 (2000). Following several Court hearings, the NAGPRA claims were resolved, leaving the Title VI land transfers to be resolved in this action.

The current complaint is the Third Amended Complaint, Doc. 326. The Yankton Sioux Tribe ("the Tribe") alleges the Federal Defendants violated Sections 605(b)(3) and 605(c) of WRDA by transferring the White Swan Recreational Area, the North Point Recreational Area, the Visitor's Center and by leasing the Spillway Recreational Area to the State of South Dakota, because those lands are located within the exterior boundaries of the Yankton Sioux Reservation. The Tribe admits in their current complaint that "The Army Corps of Engineers held title to the lands from the time they were acquired from their original Indian owners up to the enactment of Title VI by Congress." (Doc. 326 at ¶ 31.) The Tribe alleges the Federal Defendants acted in excess of the statutory authority granted by Congress, and as an administrative agency and officers of such agency, their actions are reviewable under the Administrative Procedures Act ("the APA"), 5 U.S.C. § 707(2)(A) and

(C). In the Prayer for Relief, the Tribe seeks a declaration, pursuant to 28 U.S.C. § 2201, that the transfer and leasing of the lands set forth above violated WRDA, and are, therefore, null and void. Another declaration the Tribe seeks is that the transfer and leasing did not remove these lands from the exterior boundaries of the Yankton Sioux Reservation. Mandamus relief is also requested, to require the Federal Defendants to cancel all deeds transferring the lands at issue and the lease of the Spillway Recreation Area. Injunctive relief, prohibiting the Federal Defendants from transferring any further Corps of Engineers' land to the State on the properties at issue in this action, is also sought by the Tribe. An award of reasonable attorney's fees, expert witness fees and costs, is sought under the Equal Access to Justice Act, 28 U.S.C. § 2412.

The Federal Defendants deny their actions violated WRDA. They deny the Visitor's Center was transferred to the State. Rather, the Corps retained the Visitor's Center because it is necessary for the Corps operation of the Fort Randal Dam. The Federal Defendants contend leasing land is not subject to the same prohibition land transfers are subject to under WRDA, which is that land is not to be transferred if it is within the exterior boundary of an Indian reservation. As far as reviewing agency action, the Federal Defendants contend the subsection of the APA that is applicable to the Court's review of the Corps' actions is 5 U.S.C. § 706(2)(A), which provides the Court shall, " . . . hold unlawful and set aside agency action,

findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Because the exterior boundaries of the Yankton Sioux Reservation were unclear at the time WRDA was enacted, the Federal Defendants sought input from various sources to assist them in making the determination of whether they had the authority to transfer the lands at issue in this action. They contend after receiving input from all relevant sources, including the Tribe, the decision was made that the lands at issue were not within the exterior boundaries of the Yankton Sioux Reservation and the White Swan Recreation Area and the North Point Recreation Area were transferred to the State.

In response to the Federal Defendants' summary judgment motion, the Tribe contends the proper subsection of the APA to be applied in this case is 5 U.S.C. § 706(2)(C), which provides that the Court shall " . . . hold unlawful and set aside agency action, findings, and conclusions found to be – (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]" The Tribe admits "the 1858 boundaries may not have full effect," but then contends "the Reservation retains the Missouri River as its southern exterior boundary, especially where the lands at issue are concerned." (Plaintiffs' Response, Doc. 313 at p. 5.)

The State Defendants contend in their summary judgment materials that res judicata bars this action and that the Eighth Circuit was wrong in deciding the case of *Yankton Sioux Tribe v. Gaffey,* 188 F.3d

1010 (8th Cir.1999), which action was remanded to this Court. A Memorandum Opinion and Order was issued December 19, 2007 on the remand. *See Yankton Sioux Tribe v. Podhradsky,* CIV 98-4042 (D.S.D.) (Memorandum Opinion and Order, Doc. 427).

Addressing the State Defendants' res judicata arguments, the Tribe contends a final judgment has not been issued in the *Gaffey* case and thus, cannot bar the present action on the grounds of res judicata.

II. DISCUSSION

A. Motion for Summary Judgment

Summary judgment is appropriate if the moving party establishes that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby Inc.,* 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In reviewing a motion for summary judgment, this Court views the evidence in a light most favorable to the non-moving party. *See Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 158-59, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). *"Once the motion for summary judgment is made and supported, it places an affirmative burden on the non-moving party to go beyond the pleadings and 'by affidavit or otherwise' designate 'specific facts showing that there is a genuine issue for trial.'" Commercial Union Ins. Co. v. Schmidt,* 967 F.2d 270, 271 (8th Cir.1992) (quoting Fed.R.Civ.P. 56(e)).

After the summary judgment motions were filed and briefed and taken under advisement, the Court issued a decision in the related *Podhradsky* case. CIV 98-4042 (Memorandum Opinion and Order, Doc. 427). A Declaratory Judgment was entered in the *Podhradsky* case, declaring as follows:

> [T]he Court declares the following categories of land within the original 1858 treaty boundaries of the Yankton Sioux Reservation remain part of the reservation and are Indian country under 18 U.S.C. § 1151(a):
>
> > a) land reserved to the federal government in the Act of Aug. 15, 1894, Ch. 290, 28 Stat. 286, 314-19, and then returned to the Yankton Sioux Tribe;
> >
> > b) land allotted to individual Indians that remains held in trust;
> >
> > c) land taken into trust under the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-77); and
> >
> > d) Indian owned fee land that has continuously been held in Indian hands.

Podhradsky, CIV 98-4042 (Judgment, Doc. 429, Dec. 19, 2007). The Court denied the Tribe's other claims in *Podhradsky* about additional lands continuing to be within the exterior boundaries of the Yankton Sioux Reservation, including the Tribe's claim at trial that the Reservation retains the Missouri River as its southern exterior boundary.

The Court finds regardless of which standard of review applies to the Federal Defendants' actions in this case, the decision in *Podhradsky* eliminates any possibility that the Tribe can prevail on the remaining cause of action in this lawsuit, Count One in its Third Amended Complaint, Doc. 326. As the Court mentioned above, the Tribe admitted in its Third Amended Complaint that: "The Army Corps of Engineers held title to the lands from the time they were acquired from their original Indian owners up to the enactment of Title VI by Congress." (Doc. 326 at ¶ 31.) Accordingly, the land at issue in this action does not fall within any of the four categories of land which the Court held in *Podhradsky, supra,* continue to fall within the exterior boundaries of the checkerboard Yankton Sioux Reservation. Moreover, the parties' dispute about whether the Spillway Recreation Area and the Visitor's Center were transferred to the State is now moot. Even if these two areas were transferred to the State, which the Court does not find they were, those lands are not within any of the four categories of land the Court held in *Podhradsky, supra,* are within the exterior boundaries of the Yankton Sioux Reservation.

Based upon the above discussion, there is no genuine issue of material fact remaining for trial on Count One of the Third Amended Complaint, the sole cause of action remaining in this lawsuit. Therefore, summary judgment will be granted to the State Defendants and the Federal Defendants.

B. Motion to Stay

Plaintiffs move the Court to stay the disposition of the pending summary judgment motions until such time as the appellate process in the *Podhradsky,* CIV 98-4042 (D.S.D.) case has been completed. Although the Court acknowledges the *Podhradsky* decision by this Court is subject to review by the Eighth Circuit Court of Appeals and the Supreme Court, the Court does not find the interests of justice require this Court to stay the disposition of the pending summary judgment motions. This action has been pending for nearly six years and based upon the Court's decision in *Podhradsky, supra,* Plaintiffs cannot prevail in this lawsuit. The record does not show that the property in question was anything other than Corps property when it was transferred to the State of South Dakota. Accordingly, the Court will not exercise its discretion to grant a stay in this action. *See Contracting Northwest, Inc. v. City of Fredericksburg, Iowa,* 713 F.2d 382, 387 (8th Cir.1983) *(recognizing that federal courts have the inherent power to issue a stay when the interest of justice so require). Accordingly,*

IT IS ORDERED:

1. That the State Defendants' Motion for Summary Judgment, Doc. 284, is granted.

2. That the Plaintiffs' Motion for Summary Judgment, Doc. 288, is denied.

3. That the Federal Defendants' Motion for Summary Judgment, Doc. 292, is granted.

4. That the following pending motions, Docs. 238, 242, 243, 247, are denied as moot.

5. That Plaintiffs' Motion to Stay Disposition of Summary Judgment ruling, Doc. 340, is denied.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

* *

YANKTON SIOUX TRIBE, and its individual members, Plaintiffs, vs. UNITED STATES ARMY CORPS OF ENGINEERS; PETE GEREN, Secretary of the Army; GEORGE S. DUNLOP, Principal Deputy Assistant Secretary of the Army for Civil Works; ROBERT L. ANTWERP, Chief of Engineers; DAVID C. PRESS, Omaha District Commander and District Engineer; THE UNITED STATES OF AMERICA; THE STATE OF SOUTH DAKOTA; JEFF VONK, Secretary of the Department of Game, Fish and Parks for the State of South Dakota; and JOHN DOES, Contractors, Defendants.	*	CIV 02-4126 JUDGMENT (Filed Mar. 31, 2008)

* *

In accordance with the Memorandum Opinion and Orders dated September 30, 2004, Doc. 164; September 30, 2005, Doc. 185; and December 13,

2006, Doc. 205; and the Memorandum Opinion and Order filed this date with the Clerk,

IT IS ORDERED, ADJUDGED and DECREED that Judgment is entered in favor of all Defendants and against Plaintiffs on all of the claims in this action.

Dated this 31st day of March, 2008.

BY THE COURT:

/s/ Lawrence L. Piersol
Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: /s/ Shelly Margulies
Deputy

Appendix D

396 F.Supp.2d 1087

United States District Court,
D. South Dakota,
Southern Division.

YANKTON SIOUX TRIBE, and its individual members, Plaintiffs,
v.
UNITED STATES ARMY CORPS OF ENGINEERS; Les Brownlee, Acting Secretary of the Army; John Paul Woodley, Jr., Acting Principal Deputy Assistant Secretary of the Army for Civil Works; Robert E. Flowers, Chief of Engineers; Curt F. Ubbelohde, Omaha District Commander and District Engineer; The United States of America; The State of South Dakota; John Cooper, Secretary of the Department of Game, Fish and Parks for the State of South Dakota; and John Does, Contractors, Defendants.

No. CIV. 02-4126.
Sept. 30, 2005.

Attorneys and Law Firms

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Jan L. Holmgren, Michael E. Ridgway, U.S. Attorney's Office, Sioux Falls, SD, for Defendants.

John P. Guhin, Charles D. McGuigan, Attorney General's Office, Pierre, SD, for Defendants State of South Dakota; John Cooper.

Opinion

MEMORANDUM OPINION AND ORDER

PIERSOL, Chief Judge.

After the Court allowed the Plaintiff Yankton Sioux Tribe ("the Tribe") to file a Second Amended Complaint, Defendants filed a joint Motion to Dismiss, Doc. 180. The motion has been fully briefed and will be decided based upon the written record.

BACKGROUND

The original Complaint in this action contained two distinct types of claims: one alleging violations of the Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. § 3001 *et seq.*, involving the inadvertent discovery of human remains; and one involving the transfer of lands from the United States Government to the State of South Dakota pursuant to Title VI of the Water Resources Development Act ("WRDA"), Pub.L. No. 106-53, 113 Stat. 269 (1999), *as amended by* Pub.L. No. 106-541, § 540, 114 Stat. 2572 (2000). Following several Court hearings and the appointment of a Special Master, the NAGPRA claims were resolved, leaving the Title VI land transfers to be resolved in this action.

The claims in the Second Amended Complaint relate primarily to the land transfers. In Count One, the Tribe contends that the federal Defendants violated the WRDA by transferring the White Swan and North Point Recreations Areas to the State because

those lands are within the Yankton Sioux Reservation. Count Two alleges that the transfers were completed after the January 1, 2002, deadline in the WRDA, making the transfers unlawful. In Count Three, the Tribe contends that the federal Defendants violated WRDA by failing to develop and implement clear and concise policies and procedures to ensure all requirements of NHPA would continue to be met and that they failed to take adequate steps to ensure the federal Defendants would have the ability to enforce NAGPRA, the Archeological Resources Protection Act ("ARPA"), and the National Historic Preservation Act ("NHPA") on the transferred lands. Count Four alleges a violation of § 110 of NHPA for failure to locate, inventory and nominate for inclusion on the National Register, cultural items and property within White Swan, North Point and other lands.

The relief requested in the Second Amended Complaint includes declaratory, mandamus and injunctive relief. The Tribe seeks a declaration that the transfer of the White Swan and North Point recreational areas are null and void because those lands are within an Indian reservation and the transfer was made too late. It seeks a further declaration that the transfer of these lands to the State could not remove these lands from the exterior boundaries of the Yankton Sioux Reservation. Mandamus relief is requested to cancel all deeds transferring land to the State pursuant to WRDA. Both declaratory and mandamus relief are requested to require the federal Defendants to devise and implement a concise and

practical plan to continue to comply with NAGPRA, ARPA and NHPA. Mandamus relief is requested to require Defendant United States Army Corps of Engineers to locate, inventory and nominate for inclusion in the National Register all Native American cultural items and other historic properties within North Point and other lands the Tribe claims are at issue in this action. The final relief requested is an injunction to stop all construction activities on the transferred lands and to prevent any additional transfers of land to the State.

In their Motion to Dismiss, Defendants contend that the Tribe lacks standing to pursue the claims in its Second Amended Complaint and that some of the claims must be dismissed as moot, requiring dismissal of the Tribe's claims pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction. Defendants contend the Tribe has not articulated any concrete and particularized, actual or imminent injury to a legally protected interest and, thus, there is no case or controversy cognizable in this Court. According to Defendants, the land transferred to the State under WRDA was not within the boundaries of the Yankton Sioux Reservation. As to the claim regarding the late transfer under WRDA, Defendants contend the Tribe was not harmed by the late transfer and, thus, was not within the "zone of interest" to be protected by the statute. Defendants allege that only the State could have been harmed by the late transfer of title. Additionally, Defendants claim that Count Two must be dismissed under Rule 12(b)(6) for

failure to state a claim upon which relief may be granted and that Count Four must be dismissed because the Tribe failed to exhaust administrative remedies.

DISCUSSION

In considering a motion to dismiss, the Court must assume all facts alleged in the complaint are true, *Coleman v. Watt,* 40 F.3d 255, 258 (8th Cir.1994), and the complaint is to be viewed in the light most favorable to the non-moving party, *Frey v. Herculaneum,* 44 F.3d 667, 671 (8th Cir.1995). "A motion to dismiss should be granted as a practical matter . . . only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Id.* (citations and quotation marks omitted). If the Plaintiff lacks standing, the Court is without subject matter jurisdiction and is required to dismiss this action. *See Faibisch v. University of Minnesota,* 304 F.3d 797, 801 (8th Cir.2002).

A. Count One

"In order to satisfy Article III's standing requirements, [Plaintiff] must have (1) suffered an injury in fact (2) that is fairly traceable to the challenged conduct and (3) likely to be redressed by the proposed remedy." *Starr v. Mandanici,* 152 F.3d 741, 748-49 (8th Cir.1998). "The injury must be 'concrete and particularized,' not 'conjectural' or 'hypothetical,' and

'must affect the plaintiff in a personal and individual way.'" *Id.* (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 & n. 1, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). "In other words, the injury must be beyond that shared in substantially equal measure by all or a large class of citizens." *Id.* (quotation marks and citations omitted).

In this case, the Tribe alleges that the land transferred to the State pursuant to WRDA included lands that "are located within the exterior boundaries of the Yankton Indian Reservation, and in which the Yankton Sioux people continue to own legally-protected interests." (Second Amended Complaint, ¶ 1.) In contrast, the Defendants contend that the North Point Recreation Area and the White Swan area are not within the exterior boundaries of the Yankton Sioux Reservation.

At this stage of the proceedings, it appears that whether the lands are within the Yankton Sioux Reservation is the primary issue under Count One because the WRDA provides that the land to be transferred under § 605(b), is land that:

> (1) is located above the top of the exclusive flood pool of the Oahe, Big Bend, Fort Randall, and Gavin's Point projects of the Pick-Sloan Missouri River Basin program;
>
> (2) was acquired by the Secretary for the implementation of the Pick-Sloan Missouri River Basin program;

> (3) *is located outside the external boundaries of a reservation of an Indian Tribe*; and
>
> (4) is located within the State of South Dakota.

WRDA, § 605(b) (emphasis added). Thus, if the transferred land is within the external boundaries of the Yankton Sioux Reservation, it appears that land should not have been transferred under WRDA § 605(b). The Court notes that the status of the Yankton Sioux Reservation and its boundaries is currently pending before the Court in another matter, *Yankton Sioux Tribe v. Gaffey,* CIV 98-4042 (D.S.D.). But for purposes of the motion to dismiss, since the Tribe is the non-moving party, the Court must accept as true the Tribe's allegations that the transferred lands are within the exterior boundaries of the Yankton Sioux Reservation and that the transfer to the State of South Dakota caused injury to Plaintiff's legally-protected interests in those lands. Thus, the Tribe has established for purposes of the motion to dismiss that it has suffered an injury in fact that is fairly traceable to the transfer of lands pursuant to WRDA, which would likely be redressed by voiding the transfers. Count One, therefore, will not be dismissed.

B. Count Two

The claim in Count Two is that because the transfer of lands was completed *after* the deadline set forth in the statute, the Secretary was divested of authority to complete the transfers, thereby making

the transfers null and void. The statute provides: "DEADLINE FOR TRANSFER OF RECREATION AREAS. . . . [T]he Secretary shall transfer recreation areas not later than January 1, 2002." WRDA, § 605(a)(1)(B), *as amended by* Pub.L. 106-541(d)(1)(C). Defendants contend that the Tribe lacks standing to pursue this claim because it was not within the zone of interest to be protected by this statute and they also seek a dismissal of this claim under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. The Rule 12(b)(6) argument advanced by Defendants is that the transfers are not void as the Secretary was not divested of authority to complete the transfers despite the failure to complete the transfers before the deadline in the statute.

In *Crow Creek Sioux Tribe v. Brownlee,* 331 F.3d 912, 915 (D.C.Cir.2003), the court stated:

> In order to allow time for briefing and argument on the transfer issue, the district court, pursuant to agreement of the parties, ordered South Dakota not to accept title to the recreation areas until February 8, 2002. . . . As a result, the Corps transferred title to the recreation areas to South Dakota on February 8, 2002.

This explains why the transfer was late by 38 days.

The Sixth Circuit recognized that, "[t]he Supreme Court has held that courts are not to assume that an agency has lost jurisdiction merely because it has not acted within a statutorily specified time limit."

Friends of Crystal River v. United States Envtl. Prot. Agency, 35 F.3d 1073, 1080 (6th Cir.1994) (citing *General Motors Corp. v. United States,* 496 U.S. 530, 542, 110 S.Ct. 2528, 110 L.Ed.2d 480 (1990); *Brock v. Pierce County,* 476 U.S. 253, 258-62, 106 S.Ct. 1834, 90 L.Ed.2d 248 (1986)). If there is a consequence provided in the statute for the agency's failure to comply with the statutorily specified time limit, however, "the agency will lose jurisdiction to act." *Id.* (citing *Fort Worth Nat'l Corp. v. Federal Sav. & Loan Ins. Corp.,* 469 F.2d 47, 58 (5th Cir.1972) (noting that a statutory time period is mandatory if the statute "both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision.")).

The statute contains the directive that the Secretary "shall" transfer the lands by the deadline, but the Supreme Court has held that "the mere use of the word 'shall' in [a statute requiring agency action], standing alone, is not enough to remove the [agency's] power to act after [the statutorily specified time limit]." *Brock v. Pierce County,* 476 U.S. 253, 262, 106 S.Ct. 1834, 90 L.Ed.2d 248 (1986.) Despite the addition of a specific deadline, Congress did not delete the original transfer deadline provided in § 605(e)(2), which provides that, "[a]ll land and recreation areas shall be transferred not later than 1 year after the full capitalization of the Trust Fund described in section 603." Moreover, Congress did not provide any

type of consequence for failure to transfer the lands by January 1, 2002.

The cases cited by the Tribe in opposition to Defendants' argument that the Corps was not divested of authority to transfer the lands after the statutory deadline are inapposite. None of the cases involved agency action explicitly authorized by Congress that was completed after the expiration of a statutorily specified time limit. For example, *Royal Indemnity Co. v. United States,* 313 U.S. 289, 294, 61 S.Ct. 995, 85 L.Ed. 1361 (1941), involved an issue of whether the authority to act by an agency could be *implied* from a statute. Likewise, *Spirit Lake Tribe v. North Dakota,* 262 F.3d 732, 740 (8th Cir.2001), involved a question of whether a subordinate officer in an agency could abandon Government property without congressional authorization. In *United States v. City and County of San Francisco,* 112 F.Supp. 451, 453 (N.D.Cal.1953), the district court considered whether an agency official had authority to execute an agreement with the defendant, a private contractor. The United States Court of Federal Claims considered in *Karuk Tribe of California v. United States,* 41 Fed.Cl. 468, 471 (Fed.Cl.1998), whether an Indian tribe was entitled to just compensation for a taking of land that the executive branch had turned over to the tribe, where Congress had not authorized such disposition. The issue in *Kern Copters, Inc. v. Allied Helicopter Serv., Inc.,* 277 F.2d 308, 313 (9th Cir.1960), was whether an Army official had authority to relinquish title to a wrecked helicopter. The above cases involve

questions of whether an agency of the United States was ever authorized by Congress to take the action it took. In this case, Congress explicitly delegated to the Secretary the authority to transfer the lands to the State. Moreover, the cases cited by the Tribe do not involve tardy agency action and whether the agency is divested of jurisdiction to act after the expiration of a time period established by Congress.

The Tribe cites *United States v. Board of Com'rs of Fremont County,* 145 F.2d 329, 330 (10th Cir.1944), for the proposition that Congress has the exclusive right to "designate the persons to whom real property belonging to the United States shall be transferred, and to prescribe the conditions and mode of the transfer[.]" The Court does not disagree with this statement of the law, but it does not address the issue presented in this case of whether the Corps' failure to complete the transfers before the deadline divested it of the authority to complete the transfers. The one case cited by the Tribe that relates to tardy agency action does not compel the result advocated by the Tribe. *See Gold v. The Confederated Tribes of the Warm Springs Indian Reservation,* 478 F.Supp. 190, 198 (D.Or.1979). The district court in *Gold* found that the Bureau of Indian Affairs ("BIA") lost authority to adopt a plan for distribution of a judgment fund, but that authority was not lost *solely* due to failure to comply with a statutory time limit. *See id.* Rather, the BIA failed to afford statutory procedural protections to 321 tribal members. *See id.* The district court stated an elapse of 270 days from when the plan was

due to Congress and the elapse of five years since Congress had appropriated the money to pay the judgment were additional reasons for divesting the BIA of authority to act, and notably the district court did not cite any authority for the proposition that tardy agency action *alone* would divest the BIA of authority to act. *Cf. Brock*, 476 U.S. at 266, 106 S.Ct. 1834 (holding that a statutory provision that an agency "shall" perform certain functions within a prescribed period "does not, standing alone, divest the [agency] of jurisdiction to act after that time."). In contrast to the cases cited by the Tribe, the cases cited by Defendants specifically address an agency's power to act after the expiration of a statutory time limit.

Based upon the above discussion of case law, the Court finds that the failure to transfer the lands until 38 days after the statutorily prescribed time period did not divest the Secretary of authority to complete the land transfers authorized by the WRDA. Congress explicitly authorized the Secretary to transfer the lands at issue and Congress did not provide any consequences in the statute for failure to comply with the deadline in the statute. *See Fort Worth Nat. Corp. v. Federal Sav. and Loan Ins. Corp.*, 469 F.2d 47, 58 (5th Cir.1972) (recognizing that "[a] statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision."). Thus, Count Two of the Second Amended Complaint fails to state a

claim upon which relief may be granted and it will be dismissed with prejudice.

C. Count Three

The Tribe contends in Count Three that the Corps has failed to "take adequate steps to insure that it maintains and will continue to maintain the same practical ability to enforce the provisions of NAGPRA, ARPA and the NHPA on the transferred Pick-Sloan Program lands that it had prior to the transfer of these lands." (Second Amended Complaint, ¶ 65.) Violations of the Administrative Procedure Act and WRDA are asserted as a result of federal Defendants' alleged failure to devise and implement "a concise and practical plan to insure that the United States can continue to comply with its obligations under [NAGPRA, ARPA and NHPA]." (*Id.* at ¶ 67.)

Defendants assert that the Tribe lacks standing to pursue Count Three because it has failed to allege an injury that is concrete and particularized and sufficiently imminent or actual, rather than conjectural and hypothetical. *See Lujan*, 504 U.S. at 560-61, 112 S.Ct. 2130 (explaining the elements of the constitutional minimum of standing). Count Three is not targeted at any present, ongoing violation of NAGPRA, ARPA or NHPA. In addition, Defendants contend that the Tribe has failed to establish the existence of a causal connection between the alleged failure to develop a plan to comply with NAGPRA, ARPA and NHPA on the transferred lands and the

complained of conduct of transferring the lands under the WRDA. Rather, as recognized by the court in *Brownlee,* 331 F.3d at 917-18, "any lack of federal enforcement would be traceable not to the challenged land transfer, but rather to the Secretary's failure to fulfill his continuing statutory duties under the cultural protection statutes."

The Court agrees with the *Brownlee* court that if the federal Defendants fail to comply with their duties under NAGPRA, ARPA or NHPA, such failure would not be traceable to the challenged land transfer. *See id.* Moreover, the Tribe has not cited to any statutory or constitutional requirement that the federal Defendants devise and implement "a concise and practical plan" to comply with NAGPRA, ARPA or NHPA, despite the desirability of such a plan. Thus, the Court does not find that the Tribe has satisfied its burden to show it has suffered an injury in fact that is not conjectural and hypothetical relating to the alleged failure to devise and implement a plan to comply with the cultural resource protection statutes at issue in Count Three. Count Three will be dismissed without prejudice.

D. Count Four

In Count Four, the Tribe alleges a violation of § 110 of NHPA for failure to locate, inventory and nominate for inclusion on the National Register, items and property within White Swan, North Point and other lands "that appear to qualify for inclusion

in the National Register." (Second Amended Complaint, Doc. 165, ¶¶ 70-71.) Defendants move to dismiss this claim on two grounds: (1) the claim is moot because a Cultural Resources Management Plan ("the Plan") for Lake Francis Case, including the North Point and White Swan Recreation Areas, has been adopted, which satisfies the Corps' obligations under Section 110 of the NHPA; and (2) the Tribe has failed to exhaust its administrative remedies with regard to the nomination of sites to the National Register of Historic Places ("the National Register").

The Tribe's responses to Defendants' arguments regarding Count Four are: (1) the Plan does not meet the standards under the NHPA to ensure the protection of cultural resources; and (2) this Court has subject matter jurisdiction under 28 U.S.C. § 1361, providing for subject matter jurisdiction over causes of action in the nature of mandamus.

The Court need not consider the issue of whether the Plan satisfied the Corps' obligations under Section 110 of the NHPA. Rather, this claim will be dismissed for failure to exhaust administrative remedies. Although the Court has the authority to grant mandamus relief under 28 U.S.C. § 1361, the Tribe is not excused from exhausting its administrative remedies under that statute.

In a prior lawsuit, the Tribe attempted to pursue claims similar to those in Count Four. *See Yankton Sioux Tribe v. United States Army Corps of Engineers*, 194 F.Supp.2d 977, 990-94 (D.S.D.2002). The claims

were dismissed without prejudice because they were not ripe for review and the Yankton Sioux Tribe had not exhausted its administrative remedies. As the Court recognized in the prior case, "[t]he NHPA does not *require* the Tribe to exhaust its administrative remedies prior to seeking judicial review. *See* 16 U.S.C. § 470a(a)(5)." *Id.* at 992 (emphasis in original). Thus, the Court has the discretion to determine whether the action should be dismissed for failure to exhaust administrative remedies. *Id.* (citing *Missouri v. Bowen,* 813 F.2d 864, 871 (8th Cir.1987); *McCarthy v. Madigan,* 503 U.S. 140, 144, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992) (superseded by statute on other grounds) (recognizing that where Congress has not mandated exhaustion of administrative remedies, "sound judicial discretion governs" the exhaustion inquiry)). The Eighth Circuit explained the exhaustion doctrine:

> The basic concept underlying the requirements of the exhaustion doctrine is that of judicial economy. Encouraging exhaustion serves to avoid premature interruption of the administrative process by allowing an agency to apply its special expertise, to discover and correct errors, and to develop a factual background on the issue in question. Moreover, requiring exhaustion discourages the "frequent and deliberate flouting of the administrative process."

Bowen, 813 F.2d at 871 (citations omitted).

The Tribe has not alleged that the Corps has taken final action regarding any particular cultural

property. Moreover, the Tribe has not asserted that it has exercised its statutory right to appeal the Corps' failure to nominate any particular property for inclusion on the National Register. *See* 16 U.S.C. § 470a(a)(5) (providing that any person may appeal to the Secretary of the Interior a nominating authority's refusal to nominate a property for listing on the National Register). The Secretary of the Interior makes the final administrative decision on the issues of whether a property is included on the National Register, and the Tribe has not established that it has given the Secretary, through a proper administrative appeal, the opportunity to decide whether any particular property is eligible for listing on the National Register. Based upon the Tribe's allegations in the Second Amended Complaint, the Court's intervention in the administrative process would be premature and Count Four will be dismissed without prejudice. Accordingly,

CONCLUSION

Count One of the Second Amended Complaint will not be dismissed. The remaining counts, however, will be dismissed. Accordingly,

IT IS ORDERED that Defendants' Motion to Dismiss, Doc. 180, is denied as to Count One, is granted with prejudice as to Count Two, and is granted without prejudice as to Counts Three and Four.

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 08-2255

Yankton Sioux Tribe, and its individual members

Appellant

v.

United States Army Corps of Engineers, et al.

Appellees.

Appeal from U.S. District Court for the
District of South Dakota – Sioux Falls
(4:02-cv-04126-LLP)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Wollman did not participate in the consideration or decision of this matter.

September 23, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

187

(2)

No. 10-1059

In the Supreme Court of the United States

YANKTON SIOUX TRIBE, ET AL., PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTION PRESENTED

Whether the Army Corps of Engineers violated the Water Resources Development Act of 1999, Pub. L. No. 106-53, 113 Stat. 269, 385-397, amended by Water Resources Development Act of 2000, Pub. L. No. 106-541, 114 Stat. 2572, by transferring or leasing to the State of South Dakota certain lands within the "external boundaries" of the Yankton Sioux Reservation.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Discussion 5
Conclusion 8

TABLE OF AUTHORITIES

Cases:

Daugaard v. *Yankton Sioux Tribe*, petition for cert. pending, No. 10-929 (filed Jan. 18, 2011) 3, 6

Hein v. *Yankton Sioux Tribe*, petition for cert. pending, No. 10-932 (filed Jan. 18, 2011) 3, 6

South Dakota v. *Yankton Sioux Tribe*:

522 U.S. 329 (1998) 2

530 U.S. 1261 (2000) 2

Southern Missouri Recycling and Waste Mgmt. Dist. v. *Yankton Sioux Tribe*, petition for cert. pending, No. 10-931 (filed Jan. 18, 2011) 3, 6

Yankton Sioux Tribe v. *Daugaard*, conditional cross-petition for cert. pending, No. 10-1058 (filed Feb. 22, 2011) 3, 6

Yankton Sioux Tribe v. *Gaffey*:

530 U.S. 1261 (2000) 2

188 F.3d 1010 (8th Cir. 1999) 2

Yankton Sioux Tribe v. *Podhradsky*:

529 F. Supp. 2d 1040 (D.S.D. 2007) 3, 5

606 F.3d 985 (8th Cir. 2010) 3

Treaty and statutes: Page

Treaty of Apr. 19, 1858, 11 Stat. 743 2
Act of Aug. 15, 1894, 28 Stat. 286 2
Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 3
Water Resources Development Act of 1999, Pub. L. No. 106-53, 113 Stat. 391:
§ 605(a)(1), 113 Stat. 391 4
§ 605(b)(3), 113 Stat. 391 ..... 4, 6
§ 605(c)(2), 113 Stat. 391 4
§ 607(a)(4), 113 Stat. 395 4
Water Resources Development Act of 2000, Pub. L. No. 106-541, § 540(d)(3), 114 Stat. 2666 4

In the Supreme Court of the United States

No. 10-1059

YANKTON SIOUX TRIBE, ET AL., PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 606 F.3d 895. The opinions of the district court (Pet. App. 14-21, 22-31) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 2010. A petition for rehearing was denied on September 23, 2010 (Pet. App. 51). On December 17, 2010, Justice Alito extended the time within which to file a petition for a writ of certiorari to February 20, 2011, and the petition was filed on February 22, 2011 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Treaty of April 19, 1858, 11 Stat. 743, established a 430,000-acre Reservation for the Yankton Sioux Tribe (Tribe) in what is now Charles Mix County in southeastern South Dakota. *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 334 (1998). Roughly 30 years later, Congress authorized the Executive Branch to divide portions of Indian reservations into allotments: individual parcels of land that would be held in trust by the United States for the benefit of individual tribal members to whom the parcels could eventually be conveyed in fee simple. *Id.* at 335. In 1894, the Tribe ceded and sold approximately 168,000 acres of unallotted land to the United States. Act of Aug. 15, 1894, 28 Stat. 286, 314-319; see *Yankton Sioux Tribe*, 522 U.S. at 335-340.

In 1998, this Court held that the 1894 sale diminished the Reservation by severing the unallotted ceded lands from the Reservation, but declined to decide whether the Reservation had been disestablished completely. *Yankton Sioux Tribe*, 522 U.S. at 357-358. The Tribe, the State, the County, and the United States (among others) continued to litigate the current status of the Reservation in the lower courts. The court of appeals subsequently held in *Yankton Sioux Tribe* v. *Gaffey*, 188 F.3d 1010 (8th Cir. 1999), cert. denied, 530 U.S. 1261 (2000), that the Reservation had not been disestablished. *Id.* at 1013. It also held, however, that the Reservation, already diminished by lands ceded to the United States, had been "further diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands." *Id.* at 1030. This Court denied certiorari, see *South Dakota* v. *Yankton Sioux Tribe*, 530 U.S. 1261 (2000); *Yankton Sioux Tribe* v. *Gaffey*, 530 U.S. 1261 (2000).

The matter was remanded to the district court, which determined with greater specificity which lands remained part of the diminished Reservation. *Yankton Sioux Tribe* v. *Podhradsky*, 529 F. Supp. 2d 1040 (D.S.D. 2007). The court of appeals largely affirmed the district court's determination. *Yankton Sioux Tribe* v. *Podhradsky*, 606 F.3d 985, 988 (8th Cir. 2010). The State and other parties have filed petitions for a writ of certiorari in that case, challenging the court of appeals' conclusion that the Reservation has not been disestablished. See *Daugaard* v. *Yankton Sioux Tribe*, petition for cert. pending, No. 10-929 (filed Jan. 18, 2011); *Southern Missouri Recycling & Waste Mgmt. Dist.* v. *Yankton Sioux Tribe*, petition for cert. pending, No. 10-931 (filed Jan. 18, 2011); *Hein* v. *Yankton Sioux Tribe*, petition for cert. pending, No. 10-932 (filed Jan. 18, 2011). The Tribe has filed a conditional cross-petition, challenging the court of appeals' conclusion that the Reservation no longer includes allotted lands that have passed into non-Indian ownership. See *Yankton Sioux Tribe* v. *Daugaard*, conditional cross-petition for cert. pending, No. 10-1058 (filed Feb. 22, 2011). Simultaneously with the filing of this brief, the United States is filing a brief opposing those petitions and conditional cross-petition.

2. a. This case arises out of litigation related to the above-described reservation-land dispute, pending at the same time in the same lower courts. The case has its genesis in the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887, which authorized the Army Corps of Engineers (Corps) to construct dams along the Missouri River. Pet. App. 4. Some of the land that the Corps acquired for that purpose—land currently identified as the North Point, White Swan, and Spillway Recreation Areas—was within the 1858 boundaries of the

Yankton Sioux Reservation. *Id.* at 6. Most of that was formerly allotted land that the Corps bought in fee. *Id.* at 6-7, 10 n.6. A small portion was allotted land that the United States was holding in trust for tribal members, which the Corps acquired through condemnation, compensating the affected tribal members for the taking. *Id.* at 8-10 & n.5.

Several decades later, Congress enacted the Water Resources Development Act of 1999 (WRDA), which required the Corps to "transfer * * * in perpetuity" certain lands to the South Dakota Department of Game, Fish and Parks "for fish and wildlife purposes, or public recreation uses." Pub. L. No. 106-53, § 605(a)(1), 113 Stat. 391. One of the requirements for land to be transferred was that it be "located outside the external boundaries of a reservation of an Indian Tribe." *Id.* § 605(b)(3), 113 Stat. 391; see *id.* § 605(c)(2), 113 Stat. 391 (describing recreation areas transferred as "located outside the external boundaries of a reservation of an Indian Tribe"); *id.* § 607(a)(4), 113 Stat. 395 ("Nothing in this title diminishes or affects * * * any external boundary of an Indian reservation of an Indian Tribe."). A later amendment to the WRDA required the Corps to "lease * * * in perpetuity," rather than transfer in fee, particular areas. Water Resources Development Act of 2000, Pub. L. No. 106-541, § 540(d)(3), 114 Stat. 2666. Pursuant to the WRDA, the Corps transferred the North Point and White Swan Recreation Areas, and leased the Spillway Recreation Area, to the State. Pet. App. 24.

b. The Tribe sued the United States, the Corps, federal officers, the State, and state officers. Pet. App. 34. The complaint, as amended, alleged that the Corps had violated the WRDA by transferring title to the North

Point and White Swan Recreation Areas and by leasing the Spillway Recreation Area to the State. *Id.* at 24. According to the Tribe, those areas remain within the Yankton Sioux Reservation and are therefore not subject to the WRDA. *Ibid.*

The district court granted summary judgment for the defendants. Pet. App. 22-31. The court held that the outcome of the case was controlled by its 2007 decision in the reservation-land litigation described at p. 3, *supra*. Pet. App. 29; see *Podhrasky*, 529 F. Supp. 2d 1040. The court had in that decision enumerated certain categories of land that remained within the Reservation, and the recreational areas did not fall into any of those categories. Pet. App. 28-29.

c. The Tribe appealed, and the court of appeals held the appeal in abeyance pending its resolution of appeals of the district court's ruling in the other case. Pet. App. 2. After deciding those appeals (in which it largely affirmed the district court), the court affirmed the district court's decision in this case. *Id.* at 1. The court explained that, pursuant to its decision in the reservation-land appeals, the Reservation "does not include allotted land that passed out of Indian hands." *Id.* at 6. The lands at issue in this case, the court concluded, had passed out of Indian hands either before the Corps acquired them or at the time the Corps acquired them. *Id.* at 6-10 & n.6. Because the lands were therefore not part of an Indian reservation, their disposition had been lawful under the WRDA. *Id.* at 5.

DISCUSSION

The Tribe does not contend that this case merits review in its own right, but instead requests that it be held for the currently-pending petitions in the related litiga-

tion concerning the status of lands within the boundaries of the original Yankton Sioux Reservation. See *Daugaard* v. *Yankton Sioux Tribe*, petition for cert. pending, No. 10-929 (filed Jan. 18, 2011); *Southern Missouri Recycling & Waste Mgmt. Dist.* v. *Yankton Sioux Tribe*, petition for cert. pending, No. 10-931 (filed Jan. 18, 2011); *Hein* v. *Yankton Sioux Tribe*, petition for cert. pending, No. 10-932 (filed Jan. 18, 2011); *Yankton Sioux Tribe* v. *Daugaard*, conditional cross-petition for cert. pending, No. 10-1058 (filed Feb. 22, 2011). The government agrees that it would be appropriate to hold this petition pending the Court's disposition of the Tribe's conditional cross-petition in the reservation-land case, No. 10-1058.

The petition in this case challenges the decision below only to the extent that the decision relied on the court of appeals' holding in the other litigation. See Pet. 12-14. The Tribe correctly points out that the court of appeals' holding in the present case—that the lands at issue are "located outside the external boundaries of a reservation of an Indian Tribe," Pub. L. No. 106-53, § 605(b)(3), 113 Stat. 391, and thus the Corps could transfer or lease them to the State under the WRDA, see Pet. App. 5-10 & n.6—is largely derivative of the court's conclusions regarding the present-day boundaries of the Reservation.

The outcome of this case would not be affected by the disposition of the primary petitions in the reservation-land case (Nos. 10-929, 10-931, and 10-932), but could potentially be affected by the disposition of the Tribe's conditional cross-petition (No. 10-1058). The primary petitions all challenge the court of appeals' conclusion that the Reservation was not completely disestablished. Even if the Court were to grant those petitions and con-

clude that the Reservation was disestablished, that would have no effect on the court of appeals' conclusion in this case: it does not matter, for purposes of the WRDA, whether lands lie outside a reservation because the reservation boundaries do not include them (as the court of appeals held) or because there is no reservation at all (as would be the case if the Yankton Sioux Reservation was completely disestablished). Accordingly, the pendency of this case provides no reason why the primary petitions in the reservation-land case should be granted, and the Court should deny certiorari in this case even if it were to decide that those petitions warrant plenary review.

The Tribe's conditional cross-petition in the reservation-land case, however, challenges the court of appeals' determination that allotted lands that have passed into non-Indian hands are no longer part of the Reservation. That determination substantially informed the court of appeals' decision in this case. See Pet. App. 6. Were the Court to grant the primary petitions in the reservation-land case and also grant the conditional cross-petition—and then agree with the Tribe that the present-day Reservation includes allotted lands that have passed into non-Indian hands—a remand for further proceedings in this case would be appropriate. Otherwise, the petition in this case should be denied.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *Yankton Sioux Tribe* v. *Daugaard*, No. 10-1058, then disposed of as appropriate.

Respectfully submitted.

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For The Eighth Circuit

BRIEF OF RESPONDENTS STATE OF SOUTH DAKOTA, AND JEFF VONK, SECRETARY OF THE DEPARTMENT OF GAME, FISH AND PARKS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATUTORY PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
A. Historical Context: The Yankton Sioux Reservation and Litigation Regarding Its Status	4
1. Background of the Reservation	4
2. Course of the Litigation Regarding Disestablishment and Diminishment of the Yankton Sioux Reservation	5
B. Lands Directly at Issue – Background and Prior Litigation	8
1. The Flood Control Act and the Acquisition of the Lands by the Army Corps of Engineers	8
2. Transfer of These Lands to the State	9
3. Prior Litigation in this Case	10
a. Litigation in the District Court	10
b. Litigation in the Eighth Circuit	11
DISCUSSION	12
A. As the Yankton Sioux Reservation has been disestablished, the lands in question were not within the "external boundaries" of a reservation when transferred to South Dakota in 2002	13

TABLE OF CONTENTS – Continued

Page

B. Even if the Yankton Sioux Reservation was not disestablished, the Eighth Circuit should be upheld 14

1. The transfer of lands from allotted status deprived the land of any Indian country or reservation status 14

2. The Yankton Sioux Reservation's "external boundaries" had been extinguished 16

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES:

DeCoteau v. District County Court, 420 U.S. 425 (1975) 13

Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1950) 16

F.D.I.C. v. Meyer, 510 U.S. 471 (1994) 16

Gibbons v. Ogden, 22 U.S. 1 (1824) 16

Inyo County v. Paiute-Shoshone Indians, 538 U.S. 701 (2003) 15

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 118 S.Ct. 789 (1998) ..... *passim*

South Dakota v. Yankton Sioux Tribe, 530 U.S. 1261 (2000) 6

State v. Greger, 559 N.W.2d 854 (S.D. 1997) 5

Yankton Sioux Tribe v. Corps of Engineers, 2008 WL 895830 (D.S.D. 2008) *(COE I)* 11

Yankton Sioux Tribe v. Corps of Engineers, 606 F.3d 895 (8th Cir. 2010) *(COE II)* ..... *passim*

Yankton Sioux Tribe v. Gaffey, 14 F.Supp.2d 1135 (D S.D. 1998) *(Gaffey I)* 6

Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999) *(Gaffey II)* ..... *passim*

Yankton Sioux Tribe v. Podhradsky, 529 F.Supp.2d 1040 (D.S.D. 2007) *(Podhradsky I)* 6, 11

Yankton Sioux Tribe v. Podhradsky, 577 F.3d 951 (8th Cir. 2009) *(Podhradsky II)* 6

TABLE OF AUTHORITIES – Continued

Page

Yankton Sioux Tribe v. Podhradsky, 606 F.3d 985 (8th Cir. 2010) *(Podhradsky III)* 6

Yankton Sioux Tribe v. Podhradsky, 606 F.3d 994 (8th Cir. 2010) *(Podhradsky IV)* ..... *passim*

STATUTORY REFERENCES:

18 U.S.C. § 1151 ..... 1, 7, 14, 15

18 U.S.C. § 1151(a) 1, 4, 7, 15

18 U.S.C. § 1151(c) 2

25 U.S.C. § 331 5

11 Stat. 743 1

24 Stat. 388 5

28 Stat. 286 1

28 Stat. 314 1

58 Stat. 887 3

113 Stat. 269 2

114 Stat. 2572 2

STATUTORY PROVISION INVOLVED

In addition to the statutes identified by the Petition[1] at 1-2, the following provisions are integrally at issue:

The Treaty with the Yankton Sioux, 1858, ratified, 11 Stat. 743 (1859) is reprinted at Pet. App. No. 10-929 at 325-36.

The Agreement with the Yankton or Dakota Indians, in South Dakota, 1892, ratified, 28 Stat. 286, 314 (1894) is reprinted at Pet. App. No. 10-929 at 337-51.

18 U.S.C. § 1151 which defines "Indian country" states:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding

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[1] The petition filed under No. 10-1059 will be referred to as "the Petition." All references to the other petitions filed in this disestablishment litigation will be identified by their assigned case number. The term "Pet." refers to the Petition. The term "Pet. App." refers to Petitioner's Appendix. The term "2002 CR" refers to the document number in the District Court Clerk's Record. The term "T. App." refers to the Tribe's Appendix in the Eighth Circuit below. References to "SA" refer to the State's Appendix in the Eighth Circuit below. "Pet. App. No. 10-929" refers to the Appendix to the State's Petition No. 10-929. (These citations are provided as a convenience.) Collective references to the petitions in Nos. 10-929, 10-931, 10-932, and 10-1058 will be referred to as "the lead disestablishment petitions."

> the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of way running through the same.

STATEMENT OF THE CASE

The Petition accurately describes this matter as a "companion" case to the petitions for writ of certiorari filed by the State, local governments, and Southern Missouri Waste Management in Nos. 10-929, 10-931, and 10-932, as well as the Tribe's Conditional Cross-Petition, No. 10-1058. All the petitions, including this one, revolve around the issue of whether the 1858 Yankton Sioux Reservation has been disestablished. *See* Pet. 2-3. The specific land at issue in the Petition is a fragment of the land at issue in the lead disestablishment petitions. The Tribe claims in this case that 1100 acres were improperly transferred to the State pursuant to the Water Resources Development Act of 1999 ("the WRDA"), Pub. L. 106-53, 113 Stat. 269, as amended by Pub. L. 106-541, § 540, 114 Stat. 2572 (2000). The WRDA allows only land "outside the external boundaries of a reservation of any Indian tribe" to be transferred to the State. *Id.*; §§ 605(b)(3),

605(c)(1)(B).[1] The Petition argues that the 1100 acres at issue are within the "external boundaries" of the Yankton Sioux Reservation and therefore the land transfer was invalid. Pet. 3. But in order for the lands at issue to be located within the "external boundaries" of a reservation, this Court would not only have to grant both the State's Petition No. 10-929 and the Tribe's Conditional Cross-Petition No. 10-1058, but it would have to adopt virtually all of the Tribe's theories. This outcome would be, we respectfully submit, inconsistent with this Court's opinion in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998).

In confronting this claim, the Eighth Circuit quoted its earlier opinion for the proposition that the "Reservation was diminished 'by the loss of those lands originally allotted to tribal members which have passed out of Indian hands.'" *Yankton Sioux Tribe v. Corps of Engineers*, 606 F.3d 895 (8th Cir. 2010) *(COE II)*; Pet. App. 9 (quoting *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1030 (8th Cir. 1999) *(Gaffey II)*; Pet. App. No. 10-929 at 247). *COE II* held that because certain of the land at issue had been transferred out of Indian hands to non-Indians before passage of the 1944 Flood Control Act (the FCA), 58 Stat. 887, it had lost "reservation" status before it was transferred to the State by virtue of the WRDA. Pet. App. 6-8. The remainder, "a few tracts," had been acquired by condemnation after the FCA's enactment, and in this way, also passed out of Indian hands,

[1] The Eighth Circuit referred to the WRDA § 605(c)(2) which Congress redesignated as § 605(c)(1)(B) in the 2000 amendments. *COE II*, Pet. App. 4-5.

losing reservation status. Pet. App. 8-10. The transfer of the land to the State was therefore upheld. *COE II*, Pet. App. 10.

The State does not dispute that the former allotted lands at issue are not "reservation" today. The State asserts that the Reservation has been entirely disestablished and no reservation, as defined by 18 U.S.C. § 1151(a), remained after enactment of the 1894 Act. *See* State's Petition No. 10-929. Therefore, the lands in question were necessarily "outside the external boundaries of a reservation" in 2002 when transferred. Nonetheless, the State does not oppose the request to hold this Petition in abeyance until a decision regarding the lead disestablishment petitions is made, in order to fairly present the matter. The State agrees with the Tribe that this case is "inextricably intertwined" with the lead disestablishment cases. Pet. 12. Nonetheless, as demonstrated below, this case can be decided in the State's favor even if disestablishment is not found.

A. Historical Context: The Yankton Sioux Reservation and Litigation Regarding Its Status.[1]

1. Background of the Reservation.

The original boundaries of the Reservation were established in 1858 and encompassed 430,405 acres.

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[1] More detail about the history can be found in the State's Petition No. 10-929 at 5-16.

Yankton Sioux Tribe, 522 U.S. at 334. After Congress passed the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 331, each member of the Tribe received a 160-acre allotment from the then-existing Reservation. *Yankton Sioux Tribe*, 522 U.S. at 335-36. By 1892 roughly 262,000 acres had been allotted pursuant to the Act and a subsequent act. *Id.* In 1894, the Tribe ceded all the remaining unallotted acres (approximately 168,000 acres) to the United States for a "sum certain" of $600,000. *Yankton Sioux Tribe*, 522 U.S. at 337-38; Agreement Art. I, II, Pet. App. No. 10-929 at 339. The Tribe did not retain any land in common. *Gaffey II*, 188 F.3d at 1023; Pet. App. No. 10-929, 229-30. Tribal members quickly disposed of their allotments and by 1930, individual Yankton Indians owned only 43,358 acres. *State v. Greger*, 559 N.W.2d 854, 867 (S.D. 1997). By 1995, 232,000 of the original 262,000 allotted acres had been transferred in fee to non-Indians. *See Yankton Sioux Tribe*, 522 U.S. at 339.

2. Course of the Litigation Regarding Disestablishment and Diminishment of the Yankton Sioux Reservation.

The battle over whether the reservation had been disestablished arose when the Tribe claimed jurisdiction over the construction and operation of a solid waste facility on land ceded to the United States in 1894. This Court found that lands ceded to the

United States in 1894 were no longer "reservation" or "Indian country." *Yankton Sioux Tribe*, 522 U.S. at 358. It further found the external boundaries were removed by the 1894 Act. *Id.* at 345-48. However this Court did not resolve the ultimate claim of "disestablishment." *Id.* at 358.

Extensive litigation followed this Court's decision. *See Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 1135 (D.S.D. 1998) *(Gaffey I)*; Pet. App. No. 10-929 at 250-320; *Gaffey II*, 188 F.3d 1010 (8th Cir. 1999); Pet. App. No. 10-929 at 199-249; *South Dakota v. Yankton Sioux Tribe*, 530 U.S. 1261 (2000); *Yankton Sioux Tribe v. Podhradsky*, 529 F.Supp.2d 1040 (D.S.D. 2007) *(Podhradsky I)*; Pet. App. No. 10-929 at 122-163; *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951 (8th Cir. 2009) *(Podhradsky II)*; Pet. App. No. 10-929 at 71-121; *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 985 (8th Cir. 2010) *(Podhradsky III)*; Order on Petitions for Rehearing; Pet. App. No. 10-929 at 52-70; *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010) *(Podhradsky IV)*; Pet. App. No. 10-929 at 1-51.

The final Eighth Circuit opinion relies on the "law of the case" in *Gaffey II* for the proposition that the Reservation was not disestablished. *Podhradsky IV*, 606 F.3d at 1004; Pet. App. No. 10-929 at 20-25. A "reservation" was found within the extinguished boundaries and consisted of three types of land: (1) 30,051.66 acres of allotted trust lands, or lands which have been continuously in allotted status; (2) 913.83 acres of agency trust lands; and (3) 6444.47 acres of lands acquired in trust under the 1934 IRA. *Podhradsky IV*,

606 F.3d at 1001, 1017; Pet. App. No. 10-929 at 12-13, 51. This constituted roughly 200 non-contiguous parcels.

Podhradsky IV also found that § 1151 separated the "concept of jurisdiction from the concept of ownership." 606 F.3d at 1007; Pet. App. No. 10-929 at 27. Prior to 1948 and the enactment of § 1151, allotted lands within the former boundaries which lost allotted status when sold to non-Indians, also lost their characteristics as reservation and "Indian country." *See* 606 F.3d at 1007-1008; Pet. App. No. 10-929 at 27-28. But according to *Podhradsky IV*, after the enactment of § 1151 allotted lands within the former boundaries still qualify as "reservation" under § 1151(a), and retain their "reservation" and "Indian country" status even when the allotted status is surrendered. *See id.* at 1007-1008, 1017; Pet. App. No. 10-929 at 27-29, 50. At least 5900 acres of allotted lands have lost allotted status since 1948 – these lands are now owned by non-Indians. *See* 2007 Ex. 210. The Eighth Circuit's decision creates permanent "reservation" status for each parcel of allotted land and each parcel of post-1948 former allotted land within extinguished boundaries regardless of whether it is owned in fee by a non-Indian – a concept never before seen in Indian law jurisprudence.

B. Lands Directly at Issue - Background and Prior Litigation.

1. The Flood Control Act and the Acquisition of the Lands by the Army Corps of Engineers.

The lands at issue were acquired by the United States Army Corps of Engineers (the Corps) for the construction of mainstem reservoirs authorized by the FCA. *COE II*, Pet. App. 4. Except for a 40 acre parcel which had "apparently" been "ceded" to the United States in 1894, the 1100 acres had been "allotted to individual members of the Tribe." Pet. App. 6, & n. 3. Most of the originally allotted lands, roughly 900 acres, were in non-Indian ownership when purchased by the Corps. T. App. 198-199, 212-218.

Roughly 201 acres of the land, however, were held in allotted trust status when acquired by the Corps in the late 1940s. *Id.* The allotted lands, held by individual Indians, were the subject of "condemnation proceedings some sixty years ago," in United States District Court. *COE II*, Pet. App. 8. The "Bureau of Indian Affairs did not oppose condemnation." *Id.* Rather, the BIA "negotiated appropriate compensation for the Indian allottees." *Id.* "[E]ach allottee signed a Consent to Transfer of Lands acknowledging that, in exchange for specified compensation, 'absolute fee title will be conveyed to the United States . . . by court decree[.]'" *Id.* After "final condemnation orders" were entered, the Attorney General of the

United States issued a letter to the Secretary of the Army stating "'valid title to the above tract is vested in the United States in fee simple.'" *Id.* The Tribe conceded "that the United States of America held fee simple title to these tracts when the WRDA was enacted, and when the Corps transferred them to the State." *Id.*

2. Transfer of These Lands to the State.

The Corps had acquired excess lands for construction of reservoirs and the WRDA provided these lands should be conveyed to the State, the Cheyenne River Sioux Tribe, and the Lower Brule Sioux Tribe to provide for fish and wildlife and public recreation. *See generally, COE II*, Pet. App. 4. The excess lands could be conveyed to the State, but only when "'located outside the external boundaries of a reservation of any Indian tribe.'" *COE II*, Pet. App. 4.

The Acting Regional Director of the BIA, Cora L. Jones, determined on November 17, 2000, that the lands at issue in this case, "do not lie on trust land, are not within current reservation boundaries, and do not seem to be in areas designated as the Great Sioux Reservation in the Fort Laramie Treaty of 1868." T. App. 547-548. The Corps followed by publishing a statement in the Federal Register in 2001, a finding that the lands in question are "located outside the external boundaries of the reservation of an Indian

tribe." 66 Fed. Reg. 11,008 (Feb. 21, 2001); SA 93. On January 26, 2002, the North Point and White Swan recreation areas, among others, were transferred by quit claim deed to the State. T. App. 709-717.

3. Prior Litigation in this Case.

a. Litigation in the District Court.

Three complaints were filed in this action. The first, filed in 2002, did not argue that the land was within a "Yankton Sioux Reservation" or that the WRDA prohibited the transfer of the land to the State. 2002 CR 1. Rather, the complaint alleged environmental and cultural preservation issues which were later resolved. *Id.* The second complaint, filed in 2004, claimed for the first time "reservation" status for the North Point and White Swan lands. *See* 2002 CR 165. The complaint further asserted the transfer of the lands to the State was invalid under the WRDA because the lands were within a "reservation." *Id.* The third complaint, filed in 2007, added two additional areas – the Visitor's Center and Spillway Recreational areas – to the dispute. 2002 CR 279.

The district court resolved the question of whether the transfer of lands to the State was valid on the basis of its own prior ruling in the lead disestablishment litigation. The district court found that its

decision in *Podhradsky I* eliminated "any possibility that the Tribe can prevail" because the land at issue "does not fall within any of the four categories of land which the Court held" constitute the Yankton Sioux Reservation. *COE I*, Pet. App. 29. There was no remaining controversy because the Tribe had admitted that the Corps had held the "'title to the lands from the time they were acquired from their original Indian owners up to the enactment of'" the WRDA. *Id.*

The Tribe's complaints with regard to the Spillway Recreation area and the Visitors Center were declared moot, with the court adding that "[e]ven if these two areas were transferred to the State, which the Court does not find they were, those lands are not within any of the four categories of land" constituting the Yankton Sioux Reservation. *COE I*, Pet. App. 29.

b. Litigation in the Eighth Circuit.

COE II found the reservation had been diminished "'by the loss of those lands originally allotted to tribal members which have passed out of Indian hands.'" *Id.* at 9 (quoting *Gaffey II*, 188 F.3d at 1030; Pet. App. No. 10-929 at 247). The Tribe argued, in effect, that while that rule may apply to transfers of allotted lands to non-Indians (here the 900 acres of lands which were in non-Indian hands before the COE acquired them), it did not apply to land transferred to the United States by condemnation (here the 200 acres) as the United States was not a "'white

settler [or] homesteader[.]'" *COE II*, Pet App. 9. The Eighth Circuit held that the rule was "not so limited" and applied to transfers of allotted lands from tribal members to the United States, as well as transfers of allotted lands to non-Indian homesteaders. *Id.* Therefore, because all of the land at issue had passed out of allotted status into non-Indian hands, the land was not "reservation" or within a "reservation" and the entire transfer was valid.[4] *Id.* at 10.

DISCUSSION

The State agrees with the Tribe that this Petition and the lead disestablishment petitions are closely related and therefore it is practical to hold this Petition until resolution of the lead disestablishment petitions. If the Court grants the lead disestablishment petitions and finds the Reservation entirely disestablished, it follows that this Petition is without merit and should be denied. However, even in the absence of finding the Reservation wholly disestablished, the *COE II* decision can be upheld, as demonstrated below.

[4] *COE II* noted that given its "broader rejection of the Tribe's claims," it did not need to address the lease of the "spillway claim." *COE II*, Pet. App. 5, n. 2.

A. As the Yankton Sioux Reservation has been disestablished, the lands in question were not within the "external boundaries" of a reservation when transferred to South Dakota in 2002.

Petitioner's central assertion is that the transfer to the State of the lands in question violated the WRDA because the land was within the "external boundaries" of a reservation. As the State demonstrates in its Petition No. 10-929, the Reservation was entirely disestablished by virtue of the Act of 1894. Therefore the transferred lands could not have been within the "external boundaries" of a reservation. *Yankton Sioux Tribe* found that the "'cession' and 'sum certain' language [of the 1894 Yankton Act] is 'precisely suited' to terminating reservation status." 522 U.S. at 344 (quoting *DeCoteau v. District County Court*, 420 U.S. 425, 445 (1975)). This Court further found that the "terms of the 1894 [Yankton] Act parallel the language that this Court found terminated the Lake Traverse Indian Reservation in *DeCoteau*[ ] and, as in *DeCoteau*, the 1894 Act ratified a negotiated agreement supported by a majority of the Tribe." *Yankton Sioux Tribe*, 522 U.S. at 344. This, together with the additional arguments in the State's Petition No. 10-929, establishes that the Reservation was disestablished as of 1894.

B. Even if the Yankton Sioux Reservation was not disestablished, the Eighth Circuit should be upheld.

Even if the State's disestablishment argument is not sustained, the Corps' transfer of the recreation lands to the State was valid on other grounds and the Eighth Circuit's decision can be upheld.

1. The transfer of lands from allotted status deprived the land of any Indian country or reservation status.

The Eighth Circuit in *COE II* relied on *Gaffey II*, for the proposition that the external boundary of the Reservation had been eliminated but that each parcel of trust land had its own reservation boundary. Pet. App. 3-4, 6-7. Further, following *Gaffey II*, it found that the reservation was diminished "by the loss of those lands originally allotted to tribal members which have passed out of Indian hands." *COE II*, Pet. App. at 9 (quoting *Gaffey II*, 188 F.3d at 1030, Pet. App. No. 10-929 at 247). Because all 1100 acres of the former allotted lands had been transferred to non-Indians, none were "reservation". Under the theory of *Gaffey II*, as followed in *COE II*, the external reservation boundary was eliminated, and the only reservation boundaries were around individual parcels of trust land. *See generally*, Pet. App. 6, n. 4. Therefore, the 1100 acres could not be within a "reservation" under any theory and the transfer was valid.

The State is nonetheless obligated to identify a stumbling block. As noted, *Podhradsky IV* found outstanding allotments retain "reservation" status under 18 U.S.C. 1151(a); 606 F.3d at 1007-1008, 1017; Pet. App. No. 10-929 at 27-28, 50-51. *Podhradsky IV* reasons that after the enactment of § 1151 in 1948, "reservation" lands would "retain their status" as "reservation" notwithstanding the issuance of a fee patent. *Id.* at 1007-1008; Pet. App. No. 10-929 at 28. In other words, after 1948, allotted lands transferred to non-Indians *did* retain reservation status. While the Eighth Circuit appeal was pending, the United States identified "at last one trust parcel (B-64)" which was condemned "after June 25, 1948." United States Motion to Hold Appeal in Abeyance, *Yankton Sioux Tribe v. United States Amy Corps of Engineers*, Appeal No. 08-2255 (filed November 2, 2009). *See also* T. App. 305 ("DOJ did not file a condemnation action against the land [Tract No. B-64] until May 1949"). (It is of interest that neither the Tribe nor the United States mentioned this in their submissions.)

In any event, if *Podhradsky IV* means what it says, then *COE II* presumably could not have found this parcel validly transferred because it would have retained its "reservation" status. The tension between the Panels provides a reason, in addition to the more weighty reasons discussed in the State's Petition No. 10-929, to grant certiorari in that case. *See e.g., Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701, 709 n. 5 (2003) (noting grant of certiorari addressing question on which the Ninth Circuit Panels (in addition to

other circuits) had "expressed divergent views."); *Dickinson v. Petroleum Conversion Corp*, 338 U.S. 507, 508 (1950) (noting limited grant of certiorari "because of this intracircuit conflict").

2. The Yankton Sioux Reservation's "external boundaries" had been extinguished.

Even if the reservation was not disestablished, the recreation lands were not within the "external boundaries" of a reservation given the terms' natural meaning. This Court has found "[i]n the absence of [a statutory] definition, we construe a statutory term in accordance with its ordinary or natural meaning." *F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994). The natural meaning of an "external boundary" is an actual, existing and discernable outer boundary line. *See generally, Gibbons v. Ogden*, 22 U.S. 1, 74 (1824). However, according to *Yankton Sioux Tribe*, the Reservation had lost its external boundary as this "boundary line" was extinguished in 1894. 522 U.S. 345-48; *Gaffey II*, 188 F.3d at 1013, 1021, 1030; Pet. App. No. 10-929 at 203, 223, 224, 248. As there were no external boundaries, the Tribe's claim that the recreation areas were "within the external boundaries of a reservation" is without merit.

CONCLUSION

While not agreeing this case cannot separately be resolved and affirmed, the State does not oppose holding this Petition until disposition of the lead disestablishment petitions to allow a full and fair presentation of the matter.

Respectfully submitted,

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(3)

No. 10-1059

MAY 18 2011

In the
Supreme Court of the United States

YANKTON SIOUX TRIBE, AND
ITS INDIVIDUAL MEMBERS,
Petitioners,

v

UNITED STATES ARMY CORPS
OF ENGINEERS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF CHARLES MIX COUNTY, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENT, STATE OF SOUTH DAKOTA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

ARGUMENT 3

A. The General Allotment Act of 1887 provides the background for this litigation. 3

B. Judicial Estoppel. 10

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Davis v. Wakalee,
156 U.S 680 (1895) 10

DeCoteau v. District County Court,
420 U.S. 425 (1975) 4, 5, 10, 17

Department of Transp. v. Coe,
112 Ill. App. 3d 506, 445 N.E.2d 506 (1983) .. 14

Edwards v Aetna Life Ins. Co.,
690 F.2d 595 (6th Cir. 1982) 13, 16

Hossaini v. Western Missouri Medical Center,
140 F.3d 1140 (8th Cir 1998) 11

Melton v. Anderson,
32 Tenn. App. 335, 222 S.W.2d 666 (1948) ... 16

Moe v. Confederate Salish & Kootenai Tribes,
425 U.S. 463 (1976) 10

New Hampshire v. Maine,
532 U.S. 742 (2001) 14

Rosebud Sioux Tribe v. Kneip,
430 U.S. 584 (1977) 17

Scarano v. Central R.R.,
203 F.2d 510 (3d Cir. 1953) 13

Solem v. Bartlett,
465 U.S. 463 (1984) 12

South Dakota v. Yankton Sioux Tribe,
522 U.S. 329 (1998) ..... *passim*

State v. Williamson,
211 N.W.2d 184 (S.D. 1973) 12

United States v. Dion,
752 F.2d 1261 (8th Cir. 1985) 12

United States v. Dion,
476 U.S. 734 (1986) 12

United States v. Pelican,
232 U.S. 442 (1914) 5

Weddell v. Meierhenry,
636 F.2d 211 (8th Cir. 1980) 12

Yankton Sioux Tribe v. Gaffey,
14 F.Supp.2d 1135 (1998) 13, 15

Yankton Sioux Tribe v. South Dakota,
796 F.2d 241 (1986) 13

Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.,
99 F.3d 1439 (8th Cir. 1996) 15

Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.,
890 F.Supp. 878 (D.S.D. 1995) 15

Statutes

18 USC §1151(c) 5

Act of August 15, 1894, § 12, 28 Stat. 286 12

General Allotment Act in 1887 (Feb. 8, 1887). . *passim*
24 Stat. 388, ch. 119. 25 U.S.C. 331 2
24 Stat. 388, ch. 119. 25 U S.C. 348 ..... 4, 6

Yankton Sioux, Art. I, 11 Stat. 743. (April 19, 1858) 12

Other

Brief for the Federal Respondents, *Yankton Sioux Tribe, et al. v. United States Army Corps of Engineers, et al.* (No. 10-1059)(filed U.S. May 9, 2011) 15

Brief for the United States in Opposition, *Daugaard, et al. v. Yankton Sioux Tribe, et al.* (Nos. 10-929, 10-931 and 10-932)(filed U.S. May 9, 2011) 10, 13, 15

Brief of Cities Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, *Amici Curiae*, in Support of Petitions for Writ of Certiorari, *Daugaard, et al. v. Yankton Sioux Tribe, et al.* (Nos 10-929, 10-931 and 10-932)(filed U.S. Feb. 22, 2011) 2

Brief of Charles Mix County, South Dakota, as *Amicus Curiae*, in Support of Petitioner, State of South Dakota, *South Dakota v. Yankton Sioux Tribe*, 522 U S 329 (1998) (No. 96-1581) . . 11

Opening Brief for the Federal Appellant at 16, 17 n. 10, and in *United States v. Dion*, 752 F.2d 1261 (8th Cir. 1985) 12

Report of Commissioner of Indian Affairs (1891) 3, 5

INTEREST OF *AMICUS CURIAE*

Charles Mix County, *amicus curiae*, has not directly participated in this litigation. Rather, Charles Mix County has always participated in the litigation in Nos. 10-929, 10-931 and 10-932. Scarce resources prompted Charles Mix County to limit participation in this fashion. The shifting sands of the arguments of the United States have now prompted Charles Mix County to file this *amicus curiae* brief to specifically make all of the arguments of the United States a matter of record in this litigation.

Prior to this litigation all courts and parties recognized that the 1858 Yankton Reservation no longer existed. Now, the reservation status of a century later, a large portion of the area of Charles Mix County, including, in whole or in part, the Cities of Dante, Geddes, Lake Andes, Pickstown, Ravinia and Wagner, is still at issue. Consequently, a significant portion of approximately six thousand (6,000) people that reside in this area still face the prospect of being suddenly thrust into the status of residents of an Indian reservation. If this were to take place, local officials would have only limited jurisdiction and the nonmembers would have no elected voice in the governance of their affairs and property by the Yankton Sioux Tribe.

That this is even a possibility after *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), where the court unequivocally rejected the arguments of the Yankton Sioux Tribe and the United States to resurrect the 1858 reservation boundary, is profoundly disturbing.

The demographics of Charles Mix County in this area are similar to other non-reservation rural counties found in the State of South Dakota and the United States. This is a county that has a significant rural farm population. In terms of agricultural productivity, the land consistently produces above average yields on a state-wide basis. Approximately ninety-eight percent (98%) of the acres in Charles Mix County are classified as farm land This farm land has an above average valuation and an above average assessed dollars per acre worth. Ninety percent of the land is owned by nonmembers and over two-thirds of the residents are nonmembers who reside on these small farms and in small towns and cities like Dante, Lake Andes, Pickstown, Ravinia and Wagner. *See also* Brief of Cities Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, *Amici Curiae*, in Support of Petitions for Writ of Certiorari, *Daugaard, et al v. Yankton Sioux Tribe, et al.* (Nos. 10-929, 10-931 and 10-932). In all, there are forty-nine (49) political subdivisions within the county.

The relentless advocacy of the United States has played a major role in this litigation. As a result, the amicus curiae brief of the County will briefly address the General Allotment Act as a backdrop and then the shifting sands of the arguments of the United States and the role that judicial estoppel could play in curtailing advocacy of this nature. Act of February 8, 1887, (24 Stat. 388, ch. 119. 25 U.S.C. 331). At the very least, this focus should inform the perspective of the Court with reference to the legitimacy of the arguments of the United States.

ARGUMENT

> If the policy of allotting lands is conceded to be wise, then it should be applied at an early day to all alike wherever the circumstances will warrant. If we have settled upon the breaking up of the tribal relations, the extinguishment of the Indian titles to surplus lands, and the restoration of the unneeded surplus to the public domain, let it be done thoroughly. If reservations have proven to be inadequate for the purposes for which they were designed, have shown themselves a hindrance to the progress of the Indian as well as an obstruction in the pathways of civilization, let the reservations, as speedily as wisdom dictates, be utterly destroyed and entirely swept away.
>
> Report of Commissioner of Indian Affairs 8, (1891).

A. The General Allotment Act of 1887 provides the background for this litigation.

The passage of the General Allotment Act in 1887 did not constitute a fundamental change in federal Indian policy. Prior to 1887, it was the fundamental precept of federal Indian land policy that the ratification of a cession agreement would extinguish the Tribe's claim or title to the affected area. If the ceded area or area to be disestablished included only a portion of the reservation, the reservation boundaries would be necessarily diminished to include only the reduced area of the remaining reservation. If an entire reservation was to be ceded or disestablished, the boundaries were also necessarily disestablished, and the tribes involved usually were

required to remove to another reservation. In both instances, the area was automatically restored to the public domain and "opened" to homesteading. The consideration was usually a sum certain direct per capita cash payment to the tribe or individual members thereof.

After passage of the General Allotment Act, Congress continued to disestablish Indian reservations by tailoring cession agreements to conform with the guidelines set forth in Section 5 of the General Allotment Act. *DeCoteau v. District County Court*, 420 U.S. 425 (1975). In fact, disestablishment after passage of this Act took place at a much more rapid pace then had theretofore been possible.

In two respects, however, the post 1887 legislation differed materially from the earlier legislation. Most significantly, individual members of the tribes were assured under the General Allotment Act of individual acreages in the form of allotments. These individual allotments were made pursuant to Section 5 of the General Allotment Act. Act of February 8, 1887, (24 Stat. 388, 389, ch. 119. 25 U.S.C. 348). The land which remained after allotment was referred to as "surplus" or "surplus and unallotted" land. Section 5 of the General Allotment Act made provision for the eventual disposal of this surplus land. *Id.* The term "surplus land statute" was used to describe the entire process of disposing of this land subsequent to allotment. *Id.*

Secondly, those primarily responsible for the passage of the General Allotment Act professed a sincere belief that an individual member of a tribe who had received an allotment, as well as the United States, would be better off after a surplus land statute

was enacted and the surplus lands opened to settlement. The allotted member of the tribe would be exposed to "civilization" on his trust allotment, and this exposure was deemed a necessary step toward the status of citizenship. The trust allotment would be Indian country, but not an Indian reservation. *United States v. Pelican*, 232 U.S. 442 (1914). *See also* 18 USC §1151(c). Sale of the surplus land would create a fund which would serve as a source of income for the allottee until that status could be fully obtained. Moreover, the United States would, at the same time, be making available for cultivation vast tracts of land that had theretofore been lying idle. The allottee and the homesteader could cultivate the land side by side, and, as a result, the entire country would benefit. These were the "familiar forces" of Section 5 of the General Allotment Act the Court referred to in *DeCoteau*, 420 U.S. 425, 431.

In 1892, the Commissioner of Indian Affairs again addressed these forces at length in terms of letting "the reservations, as speedily as wisdom dictates, be utterly destroyed and entirely swept away." Report of the Commissioner of Indian Affairs, 136 (1892). As a graphic illustration of the "familiar forces," the Report stated that under Section 5 of the General Allotment Act "during the past three years more than 24,000,000 acres of Indian land had been restored to the public domain." Report of the Commissioner of Indian Affairs, 136 (1892). In retrospect, both the goals of this aspect of the General Allotment Act and some of the motives behind it may be questionable, but at the time they were wholeheartedly accepted in good faith.

An example of a surplus land statute enacted pursuant to Section 5 of the General Allotment Act

assists in explaining the operation and effect of such a statute. Assume a certain cession or sale for the entire eastern half of a reservation was proposed in 1888, but only a certain percentage of the members of the tribe had as of that date received an allotment. If this proposal nevertheless met with the approval of the Commissioner of Indian Affairs, he would write the Secretary of the Interior and cite Section 5 of the General Allotment Act which provided, in part:

> And provided further, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to *negotiate* with such Indian tribe for the *purchase and release* by said tribe, in conformity with the treaty or statute under which such reservation is held, *of such portions of its reservation* not allotted as such tribe shall, from time to time, consent to *sell*, . . .
>
> Act of February 8, 1887, (24 Stat. 388, 389, ch. 119. 25 U.S.C. 348).

This section would allow the United States to negotiate for the release of "such portions" of the reservation as were not allotted, regardless of the fact that only a certain percentage of allotments had yet been made, and these were scattered throughout the entire reservation. If the Secretary concurred with the proposal, he would appoint either one or several commissioners and ask that the Commissioner of Indian Affairs submit a "Draught of Instruction" for his approval. After approval, the instructions would be

forwarded to the commissioners. In most instances the information contained therein was of a very general nature.

The Commission would go to the reservation, negotiate with the tribe for the surplus lands and draw up a document for the approval of the Tribe containing the price per acre and such other specific provisions as the United States and the tribe might wish to resolve. In some cases the "cession" or "sale" terminology would appear in the text of the document, and in others it would not. In some cases, the "public domain" and "diminished reservation" terminology would be referred to repeatedly in the text of the document, and in others it would not. In all cases, the document would describe or separate the surplus area by some boundary marker or other survey from that portion of the reservation unaffected, i.e., the diminished reservation.

The only restriction in Section 5 on the method of payment for the "purchase and release" of "such portions" of the "reservation not allotted" that the Tribes were to "sell" was simply:

> Such term and conditions as shall be considered just and equitable between the United States and said tribe of Indians.
>
> *Id.*

Equally broad language in Section 5 governed the terms of the eventual disposal of the surplus portions of the reservation to the bona-fide settlers — "such terms as Congress shall prescribe." *Id.* Congressional discretion was virtually unlimited.

In exercising this broad discretion, the United States would ordinarily agree to purchase the surplus land directly from the Tribe for a sum certain. In all instances, however, the eventual disposition of the proceeds for the land was governed by Section 5:

> Purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians *to whom such reservation belonged.*
>
> *Id.*

The entire document would not be effective until ratified by Congress, again pursuant to the requirements of Section 5 of the General Allotment Act. In Washington, D.C., the document would be amended by the Congress to provide that the surplus lands to be sold or released by the Tribe would be held by the United States as trustee for the sole purpose of securing homes to actual settlers if it was adaptable for agricultural purposes again, pursuant to the requirement of Section 5 of the General Allotment Act.

The surplus portion of the reservation would thereby become essentially a part of the public domain when opened to homesteading upon amendment and ratification by Congress and Proclamation by the President. Any other portion of the reservation would remain intact and be referred to as the diminished reservation, or the remaining reserve, or just the reservation. As for those individual members of the tribe whose allotments were now to be situated in the newly created public domain, they were generally given the option to remain so situated or to relinquish

their allotment and remove to the diminished reservation and reselect therein, if a diminished reservation existed. At a later date, this whole process could be repeated one or more times on the same reservation. The original reservation would be repeatedly reduced in size, with each surplus area restored to the public domain and opened to actual settlers. Again, many members of the Tribe would elect to remain situated in the "former" reservation areas.

There would be no question in this instance as to the effect of the document as ratified on the boundaries of the original reservation, even if construed in an historical vacuum. With each opening, there would necessarily be some delineation of the area opened from the area remaining as the diminished reservation. Most often this delineation would appear in the act as some type of metes and bounds description because during this period in most instances the territory or the states involved had not yet been surveyed into distinct county subdivisions, or the surplus area did not coincide with the county boundaries.

When an act provided for the opening of all of the unallotted surplus land of the reservation, however, the effect Congress intended was not so apparent. Initially, no one questioned the effect of surplus land statutes on the boundaries of any reservation. Disestablishment was assumed. To those at all familiar with the overall policy of the United States, the answer would have been an almost obvious corollary of the act itself. After all, these were the familiar forces of the era.

The lapse of time, however, and the absence of any singular concrete reference from which to readily obtain a proper historical perspective, together with the inconsistencies and policy reversals which characterized the whole arena of Indian affairs in later decades, understandably clouded the issue — especially in the aforementioned case of where the entire reservation was opened to settlement by such a statute. This was precisely the fact situation presented in *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

DeCoteau authoritatively resolved the doubts. The fact situation in *DeCoteau* was clearly distinguishable from the untenable position rejected in *Moe v. Confederate Salish & Kootenai Tribes*, 425 U S. 463 (1976), *supra*, that allotment *per se* pursuant to *Section 6* of the General Allotment eventually disestablished reservations.

B. Judicial Estoppel.

The United States has had multiple inconsistent positions on the status of the Yankton Sioux Reservation. Judicial estoppel should bar the United States from asserting, contrary to its prior positions, its current argument that the Yankton Sioux Reservation has not been wholly disestablished, but includes approximately 37,410 acres held in trust by the United States. Brief for the United States in Opposition, *Daugaard, et al. v. Yankton Sioux Tribe, et al.* (Nos. 10-929, 10-931 and 10-932).

Judicial estoppel precludes a party from asserting a position in one legal proceeding which is contrary to a position asserted in an earlier proceeding. *Davis v.*

Wakalee, 156 U.S. 680, 689 (1895). Most jurisdictions follow the prior success rule of judicial estoppel and will only apply it when the position asserted by the party in the previous proceeding was accepted by the tribunal. *Hossaini v. Western Missouri Medical Center*, 140 F.3d 1140, 1143 (8th Cir. 1998). Some apply an absolute version of the rule where any prior position in a judicial proceeding could be used to estop a later contradictory position. *Id*. In this case, the fact that the inconsistent positions have been asserted in different stages of the *same* proceeding over a period of many years also cuts against the legitimacy of the position of the United States.

Under either of these views, the United States should also be estopped from arguing that the 1858 reservation boundaries are still intact. The shifting sands of the arguments of the United States have been not only a deliberate attempt to suit the exigencies of the moment, but have also been successful in persuading some of the courts in the past. Judicial estoppel should apply.

A thorough analysis of the shifting sands of the arguments of the United States concerning disestablishment and diminishment was provided in the County's first *Amicus* Brief in this Court. Brief of Charles Mix County, South Dakota, as *Amicus Curiae*, in Support of Petitioner, State of South Dakota, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581) (now reproduced at County App. II, 460-501 (No. 10-932)). The most recent positions of the United States as they relate directly to the Yankton Sioux Reservation are noted in this brief

In 1984 the United States was involved in multiple cases where the cession-disestablishment of a reservation was at issue. In *Solem v. Bartlett*, 465 U.S. 463 (1984), which involved the Cheyenne River Sioux Reservation in South Dakota, the United States maintained the Congress had not diminished the reservation when authorizing the sale of surplus lands. In contrast, and perhaps to emphasize the distinction made in *Solem*, the United States conceded the 1894 act diminished the Yankton Sioux Reservation in *United States v. Dion*, 752 F.2d 1261 (8th Cir. 1985), *rev'd in part*, 476 U.S. 734 (1986). *See* Opening Brief for the Federal Appellant at 16, 17 n. 10, and in *United States v. Dion*, 752 F.2d 1261 (8th Cir. 1985).

The United States also specifically cited with approval the controlling federal and state decisions that recognized and held that the 1858 Yankton Reservation was diminished or disestablished by the 1894 Yankton cession act:

> In 1858, the Yankton Sioux negotiated a treaty with the United States in which they "ceded and relinquished" to the United States all but 400,000 acres of the lands claimed by them. Treaty with the Yankton Sioux, Art. I, 11 Stat. 743 (April 19, 1858).... In 1894, Congress ratified an agreement with the Yankton Sioux which further diminished the size of their reservation. Act of August 15, 1894, § 12, 28 Stat. 286, 314. See *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir.1980); *State v. Williamson*, 211 N.W.2d 184 (S D.1973).
>
> Opening Brief of the Federal Appellant at 16, 17 n.10, *Dion*, 752 F.2d 1261.

Later, in *Yankton Sioux Tribe v. South Dakota*, 796 F.2d 241 (1986), the United States shifted position to one that supported the recognition of the 1858 Yankton Reservation. This is because the United States rarely fails to advocate the resurrection of original reservation boundaries, sooner or later, presumably because of a perceived obligation to support the tribal position regardless of the impact of its position would have on non-tribal residents.

In this Court the United States argued 1858 reservation boundary or no reservation boundary—all or nothing. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). The argument of the United States did not convince this Court to recognize that the 1858 reservation boundary was maintained.

The United States, in the initial remand of the present line of cases, succeeded in convincing the district court to again recognize the 1858 boundaries of the Yankton Sioux Reservation. *Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 1135 (1998). And now, the United States argues that "[t]he court of appeals correctly concluded that the Yankton Sioux Reservation has not been wholly disestablished and that the Reservation includes approximately 37,410 acres held in trust by the United States." Brief for the United States in Opposition, *Daugaard, et al. v. Yankton Sioux Tribe, et al.* (Nos. 10-929, 10-931 and 10-932).

The purpose of the doctrine of judicial estoppel is "preventing intentional inconsistency," *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982), precluding a party from playing "fast and loose with the courts," *Scarano v. Central R.R.*, 203 F.2d 510, 513

(3d Cir. 1953) and prohibiting parties from "deliberately shifting positions to suit the exigencies of the moment." *Department of Transp. v. Coe*, 112 Ill. App. 3d 506, 510, 445 N.E.2d 506, 508 (1983).

This Court in *New Hampshire v. Maine*, 532 U.S. 742 (2001), listed factors that assist the Court in determining whether judicial estoppel is appropriate:

> Nevertheless, several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Third, courts ask whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped "

Id. at 743.

The United States' prior arguments that the Yankton Sioux Reservation was diminished, as well as their previous position that the 1858 reservation boundaries were still intact are inconsistent with the current argument whatever that argument suggests. Any inconsistent statement harms the integrity of the judicial process and undermines public confidence in the judicial process.

The United States was successful in *Dion* in using its statement that the Yankton Sioux Reservation was diminished in order to perpetuate its argument in *Dion*. The United States was also successful in the *Yankton Sioux Tribe* case in convincing the district court and the court of appeals that Congress intended the Yankton Sioux Reservation to have its original 1858 boundaries. *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 890 F.Supp. 878 (D.S.D. 1995) and *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 99 F.3d 1439 (8th Cir. 1996). Even after this point was reversed by this Court in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, the United States maintained their initial position and succeeded in the district court once again. *Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 1135. There, the district court once again resurrected the 1858 reservation boundaries of the Yankton Sioux Reservation. *Id.*

In the current stage of this proceeding, the United States has shifted its argument once more and no longer supports the Tribe's position that the 1858 reservation boundaries still exist. Brief for the United States, *Daugaard, et al. v. Yankton Sioux Tribe, et al.* (Nos. 10-929, 10-931, 10-932 and 10-1058); Brief for the Federal Respondents, *Yankton Sioux Tribe, et al. v. United States Army Corps of Engineers, et al.* (No. 10-1059). This situation is a prime opportunity to apply the doctrine of judicial estoppel. Congress could not have intended several alternative boundaries for the Yankton Sioux Reservation. The United States' current position is clearly inconsistent with several arguments previously submitted by the United States, successful in the district court during *Yankton Sioux*

Tribe v. Southern Missouri Waste Management Dist. and *Yankton Sioux Tribe v. Gaffey*.

The rules of judicial estoppel do not prevent inconsistent pleading, but once a court has adopted one theory the litigant cannot seek an inconsistent advantage on another theory. For this reason, the United States should be estopped from adopting an inconsistent position on what Congress intended in the 1894 Act.

The United States would derive an unfair advantage if it is not estopped from their current inconsistent position. The United States should not be allowed to shift its argument to a contrary position simply to suit the exigencies of the moment. The United States has given several inconsistent positions and interpretations on the same act. They cannot all be correct. Congress only had one intention in regard to the 1894 Act. The United States has succeeded in persuading a court to accept its earlier positions and judicial acceptance of its now proffered inconsistent position would create the perception that either the first or second court was misled by the United States.

The public policy concern in which this doctrine is grounded is the preservation of the integrity of the courts and judicial process *Edwards v. Aetna Life Ins. Co.*, 690 F.2d at 598. Another policy concern that has been articulated for judicial estoppel is upholding the sanctity of the oath. *Melton v. Anderson*, 32 Tenn. App. 335, 342-43, 222 S.W.2d 666, 669 (1948).

These public policy considerations would be furthered by the estoppel of the United States. If the United States is allowed to continue shifting

arguments to meet the exigencies of the moment, there will certainly be a perception that the same court was misled either here or in the past. This perception would undoubtedly damage the public's faith in the integrity of the courts. The application of judicial estoppel would also ensure a more consistent result.

For years, the United States has played "fast and loose" with the judicial process in reservation status cases. It has proffered multiple inconsistent arguments to fit current interests at the moment. At the very least, the credibility of the arguments is diminished. For all these reasons, judicial estoppel should apply to bar the United States' argument somewhere in these proceedings.

The only consistency in the arguments of the United States is that the United States consistently argued against reservation disestablishment in all three cession cases decided by this Court. This Court was consistent in rejecting the argument of the United States in all three. *DeCoteau v. District County Court*, 420 U.S. 425 (1975), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), and *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998).

CONCLUSION

Amicus curiae Charles Mix County, while not agreeing this case cannot separately be resolved and affirmed, supports the conclusion of the State of South Dakota to not oppose holding this Petition until disposition of the lead disestablishment petitions to allow a full and fair presentation of the matter.

Respectfully submitted,

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In the
Supreme Court of the United States

YANKTON SIOUX TRIBE, AND
ITS INDIVIDUAL MEMBERS,
Petitioners,

v.

UNITED STATES ARMY CORPS
OF ENGINEERS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF LEWIS COUNTY, IDAHO, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENT, STATE OF SOUTH DAKOTA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

ARGUMENT 7

CONCLUSION 19

APPENDIX

Appendix A: Orders, In the District Court of the Fifth Judicial District of the State of Idaho, In and For the County of Twin Falls (November 11, 1999) 1a

Appendix B: Order, In the District Court of the Fifth Judicial District of the State of Idaho, In and For the County of Twin Falls (January 21, 2000) 16a

TABLE OF AUTHORITIES

Cases

DeCoteau v. District County Court,
420 U.S. 425 (1975) ..... *passim*

Dick v. United States,
208 U.S. 340 (1908) 2

In Re Snake River Basin Adjudication,
No. 39576 (5th Jud. Dist., Id County of Twin Falls) (2000) 3

South Dakota v Yankton Sioux Tribe,
522 U.S. 329 (1998) 1, 3, 4, 6, 7, 8

United States v. Pelican,
232 U.S. 442 (1914) 7

United States v. Webb,
219 F 3d 1127 (9th Cir. 2000) (Fletcher, Betty, J.), *cert. denied*, 531 U.S. 1200 (2001) .... *passim*

Yankton Sioux Tribe v. Gaffey,
188 F.3d 1010 (8th Cir. 1999), *cert. denied*, *South Dakota v. Yankton Sioux Tribe*, 120 S Ct. 2717 (2000) 7

Statutes

Act of August 15, 1894, ch. 290, 28 Stat. 286 ..... 2, 6, 7, 17, 18

Act of March 3, 1891, 26 Stat. 1036 17

Other Authorities

26 Cong. Rec 8258, 53d Cong., 2d Sess. (1894) . . 18

Brief of Clearwater County, Idaho *Amicus Curiae*, in Support of Petitioner, *Webb v. United States*, 219 F.3d 1127 (9th Cir. 2000), *cert. denied*, 531 U.S. 1200 (2001) (No. 00-8166) 4

Brief of Lewis County, Idaho *Amicus Curiae*, in Support of Petitioner, *Webb v. United States*, 219 F.3d 1127 (9th Cir. 2000), *cert. denied*, 531 U.S 1200 (2001) (No. 00-8166) 3, 7

Brief of Lewis County, Idaho, *Amicus Curiae*, in Support of Petitioner, State of South Dakota, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581) 4

Brief for the State of North Dakota, et al. as *Amici Curiae*, *DeCoteau v. District County Court*, 420 U S. 425 (1975) (No. 73-1148) 8

Clearwater Progress (Idaho), January 20, 2011 . . . 5

H.R. Rep. No 6913, 53d Cong., 2d Sess. (1894) . 18

Lewiston Tribune (Idaho), November 20, 1895, at 1 1

Lewiston Teller (Idaho), November 21, 1895, at 1 1

S. Exec. Doc. No. 31, 53d Cong., 2d Sess. (1894) 2, 8, 18

INTEREST OF *AMICUS CURIAE*

> RESERVATION IS NO MORE...At twelve o'clock Monday the Nez Perce reservation passed into history . . heads began bobbing up all over the former reservation....
>
> *Lewiston Tribune* (Idaho), November 20, 1895, at 1.

> CANNON BOOMED AT NOON...The cannon was fired in front of the land office, at twelve o'clock, Monday. This was the death knell of the great Nez Perce reservation, and the introduction of new conditions to follow these important changes.
>
> *Lewiston Teller* (Idaho), November 21, 1895, at 1.

The interest that prompts the filing of this Brief of Lewis County, Idaho, *Amicus Curiae,* in Support of Respondent, State of South Dakota, can be simply stated. Ninety percent (90%) of Lewis County is within the former 1863 Nez Perce reservation.

Lewis County, Idaho, has the support of an association of local governmental units, the North Central Idaho Jurisdictional Alliance, in filing this brief *amicus curiae*. The Alliance consists of three counties, eight cities, three school districts and seven highway districts in North Central Idaho, whose geographic boundaries include land which was within the Nez Perce reservation as it existed prior to 1894. In this instance, the Nez Perce cession agreement, like the Yankton agreement construed in *South Dakota v.*

Yankton Sioux Tribe, 522 U.S. 329 (1998), encompassed *all* of the unallotted lands of the 1863 Nez Perce reservation (except for a small timber reserve). *See also DeCoteau v. District County Court*, 420 U.S. 425, 438, 446-47 (1975). And as we will show, other pertinent factors are also remarkably similar to those found in the Yankton case. Today, the 1863 Nez Perce reservation is a rural area primarily owned and populated by non-Indians. Approximately ninety percent (90%) of the land is owned by non-Indians and approximately (90%) of the population is also non-Indian. In this rural area of central Idaho, for nearly three-quarters of a century, the jurisdictional history has also been equally clear. Early on, state and federal cases, including the pathmarking decision of this Court in *Dick v. United States*, 208 U.S. 340 (1908), were premised upon Nez Perce reservation disestablishment. However, assertions of tribal jurisdiction over nonmembers and/or claims regarding the lack of state jurisdiction over tribal members have caused the issue to resurface in the State of Idaho.

Significantly, the 1894 Indian appropriation act that ratified the Yankton cession agreement also ratified the similar Nez Perce cession agreement. Act of August 15, 1894, ch. 290, 28 Stat. 286, 326. It was not unusual for Congress to adopt this format for the ratification of more than one cession agreement, as *DeCoteau* attests. *DeCoteau*, 420 U.S. at 439-441 & nn. 21, 22 (seven agreements). As a result, although the Nez Perce agreement started out as a separate measure with independent cession instructions, agency correspondence, and tribal negotiations, and although it was reported separately as S. Exec. Doc. No. 31, 53d Cong., 2d Sess. (1894), the subsequent congressional debate addressed, among other subjects, all aspects of

both the Yankton agreement and the Nez Perce agreement—sometimes separately, but more often together.

In *Yankton Sioux Tribe* this Court recognized this important nexus and expressly noted that the agreements were "similar", with common references in the floor debates to "support a finding of diminishment". *Yankton Sioux Tribe*, 522 U.S. at 339, 353. The ninth circuit court of appeals mistakenly ignored all of this. *United States v. Webb*, 219 F 3d 1127 (9th Cir. 2000) (Fletcher, Betty, J), *cert denied*, 531 U.S. 1200 (2001). In the process, the court of appeals decided this issue, involving an important question of federal law, in express conflict and in conflict in principle with the relevant decisions of this Court, in conflict in principle with the decisions of all other courts of appeals, and in express conflict and in conflict in principle with the decisions of the Supreme Court of the State of Idaho.

The argument the United States unsuccessfully advanced against Nez Perce reservation disestablishment in a state case is set forth in detail in Lewis Co. App. 1a-62a. *In Re Snake River Basin Adjudication*, No. 39576 (5th Jud. Dist., Id. County of Twin Falls) (2000). Consideration of the issue in the Idaho Supreme Court, which has repeatedly confirmed Nez Perce reservation disestablishment for nearly a century, was stayed and eventually resolved by settlement.

At the time, Webb filed a petition for certiorari in this Court that addressed these conflicts. The State of Idaho, Lewis County, Clearwater County and other counties, filed briefs in support of that petition. Brief

of Lewis County, Idaho *Amicus Curiae*, in Support of Petitioner, *Webb v. United States*, 219 F.3d 1127 (9th Cir. 2000), *cert. denied*, 531 U.S. 1200 (2001) (No. 00-8166), and Brief of Clearwater County, Idaho *Amicus Curiae*, in Support of Petitioner, *Webb v. United States*, 219 F.3d 1127 (9th Cir. 2000), *cert. denied*, 531 U.S. 1200 (2001) (No. 00-8166). Ultimately, this Court denied certiorari. *United States v. Webb*, 219 F.3d 1127 (9th Cir. 2000), *cert. denied*, 531 U.S. 1200 (2001)

Lewis County had previously participated as *amicus curiae* in *Yankton Sioux Tribe*. Brief of Lewis County, Idaho, *Amicus Curiae*, in Support of Petitioner, State of South Dakota, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581). The ultimate decision in Yankton Sioux Tribe is important to Lewis County and the other members of the North Central Idaho Jurisdictional Alliance.

In the past, attempts to resurrect the 1863 Nez Perce reservation boundaries have been most noticeable in conjunction with assertions of tribal jurisdiction over nonmembers and fee lands. For two decades, in a number of instances non-Indian entities have been instructed to fully comply with a Tribal Employment Rights Ordinance (including the payment of substantial tribal TERO taxes and total compliance with tribally dictated hiring practices) or face tens of thousands of dollars of tribal fines or other tribal enforcement actions in tribal court. For some projects, it has been estimated that the TERO requirements would increase existing costs by hundreds of thousands of dollars. Entities that were initially said to be subject to TERO include local governmental subdivisions and school districts, as well as private

contractors. Most recently, in January, 2011, all contractors doing business on the "Nez Perce Reservation" were told to comply with the tribal TERO ordinance in no uncertain terms. *Clearwater Progress* (Idaho), January 20, 2011. Since that time, the Nez Perce Tribe has withdrawn that demand.

In addition, the Nez Perce tribe assessed an ad valorem tax against certain non-Indian businesses that conduct business on non-Indian lands within the 1863 reservation boundaries Although the exact status of this ad valorem tax is unclear, the amount at risk is substantial—potentially involving hundreds of thousands, if not millions of dollars (2.7 percent tax on assessed value). The arrest of two nonmembers by the "newly created" Nez Perce tribal police for minor traffic offenses, and their citations to appear in tribal court, added to an atmosphere already charged with uncertainty and distrust At the time, challenges to the tribal arrests were widely publicized. After a motion to dismiss by special appearance was formally filed in tribal court, the Nez Perce tribe reportedly decided, at least for the time being, to skip that jurisdictional controversy. The Nez Perce tribal prosecutor voided the citations.

The Superintendent of the Northern Idaho Agency continues to notify Lewis County of the Nez Perce tribe's approved application to remove acres of land from the tax rolls. This action was justified by the Superintendent on the basis of the existence of the 1863 reservation boundaries.

The options of Lewis County with respect to a decreasing tax base are strictly limited by Idaho statute. At some point in the future, this process, if

allowed to continue on the basis of the existence of 1863 reservation boundaries, will severely limit the services Lewis County can provide to county residents.

In light of all of the above, the status of the 1863 Nez Perce reservation is still of substantial concern to resident nonmembers and local governmental entities, more than three decades after the decision of this Court in *DeCoteau*.

In the end, local jurisdictions have been told to expect litigation on this issue at a probable cost of millions of dollars. The 1894 Act of Congress in this case is clear. The court of appeals in *Webb* was mistaken. *DeCoteau* resolved this issue. *Yankton Sioux Tribe* rejected the savings clause argument and confirmed the principles set forth in *DeCoteau*. The ninth circuit court of appeals should not have glossed over the "'nearly conclusive' or 'almost insurmountable'" presumption of disestablishment, that should have been the focal point in the *Webb* case. This Court reaffirmed that presumption in *Yankton Sioux Tribe*, 522 U.S. at 344.

This Court should reaffirm that presumption in a manner that demonstrates that the chances of success in seeking a reestablishment of original reservation boundaries in Idaho or elsewhere are slim. At the same time, such a conclusion will put this divisive issue to rest.

ARGUMENT

1. Lewis County further submits that the scope of the holding in *Webb* is less than clear from the opinion of Judge Fletcher ("the court intimated that it need not decide the status of the lands ceded in the 1894 Act. *Id.* at 1133 "). Brief of State of Idaho as *Amicus Curiae*, *Webb v. United States*, No. 00-8166 at 4. In either case, however, substantial conflicts exist. Even if *Webb* could be construed to hold only that the status of the former allotted fee lands are Nez Perce reservation, that holding would conflict in principle with the remand in *Yankton Sioux Tribe* that succinctly rejected the same claim. *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999), *cert. denied*, *South Dakota v. Yankton Sioux Tribe*, 120 S. Ct. 2717 (2000). It would also conflict in principle with the holding in *DeCoteau* and *United States v. Pelican*, *232* U.S. 442 (1914). In fact, it would be completely unprecedented.

2. Lewis County has set forth a table that makes clear that the Nez Perce act is the functional twin of the acts construed in *DeCoteau* and *Yankton Sioux Tribe*.

> Salmon River Billy: ...[T]he country had been inclosed according to the treaty and prevented the entrance on the reservation of any white man and any who should try to set aside or *break down the boundaries* of that reservation .... Perhaps it may be on account of having another President, who is a Democrat; perhaps it is he who has made the *edict for breaking down the lines of the reservation.*

S Exec. Doc. No. 31 at 56 (1894) (emphasis added).

Even before *Yankton Sioux Tribe*, it should be noted that the decision of this Court in 1975 in *DeCoteau v. District County Court*, 420 U.S 425 (1975) certainly appeared to be controlling in this situation. In *DeCoteau*, the State of Idaho joined the State of North Dakota and others as *Amici Curiae*. Brief for the State of North Dakota, et al. as *Amici Curiae* at 1, *DeCoteau v. District County Court*, 420 U.S 425 (1975) (No 73-1148). The scope of that brief, like the scope of the *DeCoteau* Opinion, was not limited to the specifics of the Sisseton-Wahpeton agreement. It submitted, in general terms, the strong, definite, acquired and clear meanings of the terms "cede," "sell," "relinquish" and "convey." *Id.* at 1. That submission was intended to resolve cessions in the context of both the Yankton agreement and the Nez Perce agreement. *DeCoteau* was crafted in the same manner.

In this cession situation, *DeCoteau* makes clear that the jurisdiction tribes should be limited to tribal trust lands. *DeCoteau*, 420 U.S. at 427 n.2, 446-447. *Webb* erred when it missed this key aspect of the *DeCoteau* decision. Federal jurisdiction simply would not extend to the former allotted fee land

Yankton Sioux Tribe generally confirmed *DeCoteau*. *Id.* at 798. Moreover, *Yankton Sioux Tribe* did not question this aspect of the *DeCoteau* opinion.

In further support of the position that *DeCoteau* is especially important here, the following table sets forth corresponding provisions of the respective acts.

SISSETON DISESTAB-LISHMENT	YANKTON DISESTAB-LISHMENT	NEZ PERCE DISESTAB-LISHMENT
Time period equivalent	*Time period equivalent*	*Time period equivalent*
Agreement approved 1891.	*Agreement approved 1894.*	*Agreement approved 1894.*
26 Stat. 1035 (1891). *See also DeCoteau*, 420 U.S. at427	28 Stat. 286 (1894). *See also Yankton Sioux Tribe*, 522 U S at 336-339.	28 Stat. 286 (1894).
Allotment of substantial territory under General Allotment Act.	*Allotment of substantial territory under General Allotment Act.*	*Allotment of substantial territory under General Allotment Act.*
DeCoteau, 420 U.S. at 455.	28 Stat. 286, 314; *See also Yankton Sioux Tribe*, 522 U.S. at 335-336.	28 Stat. 286, 326.
Interior Instructions to Commissioners	*Interior Instructions to Commissioners*	*Interior Instructions to Commissioners*
"The treaty makes no provision regarding the cession or	"The treaty makes no provision regarding the cession or	[Not Available]

relinquishment of the reservation or any portion thereof" "The terms and conditions agreed upon in Council, with the description of the lands to be relinquished, should be reduced to writing and incorporated in the accompanying form of agreement, which should be signed by at least a majority of the male adults of the bands." Letter from Commissioner of Indian Affairs to the Sisseton Commission of August 13, 1889.	relinquishment of the reservation or any portion thereof." "The terms and conditions agreed upon in council, should be reduced to writing and incorporated in the accompanying form of agreement which should be signed by at least a majority of the male adults of the members of the tribe" Letter from Commissioner, J. F. Morgan, Dept of Interior to Commissioners of July 27, 1892.	
Preambles equivalent.	*Preambles equivalent.*	*Preambles equivalent.*
The Sisseton	"The Yankton	"[T]he said Nez

Indians "are desirous of disposing of a portion of the land set aside and reserved to them...." 26 Stat. 1035, 1036, See also, *DeCoteau*, 420 U.S. at 455.	Tribe...is willing to dispose of a portion of land set aside and reserved to said Tribe...." 28 Stat. 286, 314.	Perce Indians are willing to dispose of a portion of the tract of land ..reserved.. " 28 Stat. 286, 327.
Cession language used.	*Cession language used.*	*Cession language used.*
"The Sisseton and Wahpeton Bands of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title and interest...." Art. I, 26 Stat. 1035, 1036, See also *DeCoteau*, 420 U.S. at 456.	"The Yankton Tribe of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest...." Art. I, 28 Stat. 286, 314, *See also Yankton Sioux Tribe*, 522 U.S. at 337-338.	"The said Nez Perce Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest...." Art I, 28 Stat. 286, 327.

All unallotted lands ceded.	*All unallotted lands ceded.*	*All unallotted lands ceded.*
Cession pertains to "all the unallotted lands within the limits of the reservation set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement...." Art. I, 26 Stat. 1035, 1036, See also *DeCoteau*, 420 U.S. at 456.	Cession pertains to "all the unallotted lands within the limits of the reservation set apart to said Indians as aforesaid " Art. I, 28 Stat. 286, 314; *See also Yankton Sioux Tribe*, 522 U.S. at 337-338.	Cession pertains to "all the unallotted lands within the limits of said reservation.. ." Art. I, 28 Stat. 286, 327.
Sum Certain Language Used.	*Sum Certain Language Used.*	*Sum Certain Language Used.*
Sisseton Agreement provides "[i]n consideration for the lands ceded, sold, relinquished and conveyed...the	Yankton agreement provides "[i]n consideration for the lands ceded, sold, relinquished, and conveyed to the	Nez Perce agreement provides "[i]n consideration for the lands ceded, sold, relinquished, and conveyed...the

United States stipulates and agrees to pay...the sum of two dollars and fifty cents per acre for each and every acre thereof...."Art. 2, 26 Stat. 1035, 1036, See also *DeCoteau*, 420 U.S. at 456	United States...the United States stipulates and agrees to pay.. the sum of six hundred thousand dollars...." Art. II, 28 Stat. 286, 315; *See also Yankton Sioux Tribe*, 522 U.S. at 337-338.	United States stipulates and agrees to pay...the sum of one million six hundred and twenty-six thousand two hundred and twenty-two dollars...." Art III, 28 Stat. 286, 329.
Entry subject to homestead and townsite laws.	*Entry subject to homestead and townsite laws.*	*Entry subject to homestead and townsite laws.*
"That the lands by said agreement ceded, sold, relinquished, and conveyed to the United States shall...be subject only to entry and settlement under the homestead and townsite laws of the United States..." 26 Stat 1035,	"That the lands by said agreement ceded, to the United States shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and townsite laws of the United States..."	"That ..the lands so ceded, sold, relinquished, and conveyed to the United States shall be opened to settlement by proclamation of the President, and shall be subject to disposal only under the homestead, town site, stone and timber, and

1036	28 Stat. 286, 319, *See also Yankton Sioux Tribe*, 522 U S. at 337 n.1	mining laws of the United States...." 28 Stat 286, 332.
Missionaries allowed to purchase lands.	*Missionaries allowed to purchase lands.*	*Missionaries allowed to purchase lands.*
Art II, 26 Stat. 1035, 1037, See also *DeCoteau*, 420 U.S. at 457.	Art. X, 28 Stat. 286, 316; *See also Yankton Sioux Tribe*, 522 U.S. at 336-337.	Art. VI, 28 Stat. 286, 330.
School lands granted to State with public domain / reservation extinguishment premise.	*School lands grant with public - domain / reservation extinguishment premise.*	*School lands granted to State with public domain / reservation extinguishment premise.*
("excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the	("excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be common-school purposes and be subject to the laws of the	("excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common school purposes and be subject to the

State"). 26 Stat. 1035, 1039, See also *DeCoteau*, 420 U.S. at 442. For public domain premise, see H.R. Rep. No. 7613, 59th Cong , 2d Sess. (1907).	State of South Dakota"). 28 Stat. 286, 319. For public domain premise, see H.R. Rep. No. 7613, 59th Cong , 2d Sess. (1907), *See also Yankton Sioux Tribe*, 522 U S at 339, 349-350.	laws of Idaho"). 28 Stat. 286, 332. For public domain premise, see H.R. Rep. No. 7613, 59th Cong., 2d Sess. (1907).
United States retained an agency and schools.	*United States retained an agency and schools.*	*United States retained an agency and schools.*
DeCoteau, 420 U.S at 435 n.16; *id.* At 438 n.19.	28 Stat. 286, 316; *See also Yankton Sioux Tribe*, 522 U.S. at 336, 337 n.1.	28 Stat. 286.
Allotments were throughout the former reservation. 26 Stat. 1035, 1036; *DeCoteau*, 420 U.S. at 428.	*Allotments were throughout the former reservation.* 28 Stat. 286, 314; *Yankton Sioux Tribe*, 522 U.S. at 336.	*Allotments were throughout the former reservation.* 28 Stat. 286, 314.
The proclamation opening the	*The proclamation opening the*	*The proclamation opening the*

reservation referred to a conveyance of "all their title and interest" and quoted the cession language of the Act.	*reservation referred to a conveyance of "all their claim, title and interest" and repeated the cession language of the Act.* *Yankton Sioux Tribe*, 522 U.S. at 339, 354.	*reservation referred to a conveyance of "all their claim, right, title and interest" and repeated the cession language of the Act.*
27 Stat. 1017, 1018 (April 11, 1892).	29 Stat. 865, 866 (May 16, 1895).	29 Stat. 873, 876, November 8, 1895)
Congress clearly intended to return the land to the public domain *DeCoteau*, 420 U.S. at 440-441.	*Congress clearly intended to return the land to the public domain.* 26 Cong Rec. 6425 (1894); *id.* at 6426. *Yankton Sioux Tribe*, 522 U.S. at 353-354.	*Congress clearly intended to return the land to the public domain.* 26 Cong. Rec 6425 (1894); *id.* at 6426. *See also* references to Nez Perce in *Yankton Sioux Tribe* at 353-354.
State assumed virtually unquestioned jurisdiction. *DeCoteau*, 420	*State assumed virtually unquestioned jurisdiction* *Yankton Sioux*	*State assumed virtually unquestioned jurisdiction.* *Dick v. United*

U.S at 442.	*Tribe*, 522 U.S. at 357.	*States*, 208 U.S. 340, 352 (1908)
Sisseton, Yankton, and Nez Perce generally treated in parallel fashion on maps of the United States and in the Annual Reports of the Commissioner of Indian Affairs and the Secretary of the Interior.	*Sisseton, Yankton, and Nez Perce generally treated in parallel fashion on maps of the United States and in the Annual Reports of the Commissioner of Indian Affairs and the Secretary of the Interior. See also Yankton Sioux Tribe* at 354	*Sisseton, Yankton, and Nez Perce generally treated in parallel fashion on maps of the United States and in the Annual Reports of the Commissioner of Indian Affairs and the Secretary of the Interior. See also Yankton Sioux Tribe* at 354.

Even a cursory comparison of the provisions of the Sisseton-Wahpeton act, the Yankton act and the Nez Perce act unequivocally substantiates the argument that the 1894 Nez Perce statute is a functional twin of both. For example, the "operative language" of each statute provides: "[C]ede, sell, relinquish, and convey to the United States all their claim, right, title, and interest...." Act of March 3, 1891, 26 Stat. 1036 (Sisseton-Wahpeton act-appended in *DeCoteau*, 420 U.S. at 449); "[C]ede, sell, relinquish, and convey to the United States all their claim, right, title, and interest...." Act of August 15, 1894, 28 Stat. 286, 314-318 (Yankton act); "[C]ede, sell, relinquish, and convey to the United States all their claim, right, title, and interest... " Act of August 15, 1894, 28 Stat. 286, 326

(Nez Perce act). Additional examples with the same or similar dispositive cession terminology are set forth in *DeCoteau*, 420 U.S. at 439-440 n. 21.

Beyond the "operative language" on the face of the statutes, which this Court has found to be most significant in resolving questions of this nature, the other Nez Perce documentation confirms the significance and strength of the comparison. In fact, in the congressional debates, key congressional speakers specifically reference agreements from the past as precedent for the 1894 legislation. 26 Cong. Rec 8258, 8265-69 53d Cong., 2d Sess. (1894). Mr Pickler: ". .The same kind of treaty we have always made." *Id.* at 8265. Mr. Pickler. ". . . These are treaties, just as all other cessions of land have been." *Id.* at 8268. *Webb* failed to address this fundamental premise found throughout the congressional debate.

In every other respect, the remainder of the Nez Perce documentation confirms this same understanding. For the most part, this documentation is set forth in S Exec. Doc No. 31, 53rd Cong., 2d Session (1894), which contains the official Nez Perce correspondence, reports, transcripts and cession agreement, and also in the congressional debates and reports on the 1894 Act. *See* H.R. Rep No. 6913, 53d Cong , 2d Sess. (1894); Act of August 15, 1894, 28 Stat 286.[1]

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[1] Although three short years and one session of Congress separates the passage of the Sisseton-Wahpeton and the Yankton and Nez Perce Acts, parts of the process were actually under consideration in both sessions. Many of the key congressional participants in the process continued to hold office through the passage of the 1894 Act And the fact that approximately *one third*

CONCLUSION

Amicus Curiae Lewis County, Idaho, while not agreeing this case cannot separately be resolved and affirmed, supports the conclusion of the State of South Dakota to not oppose holding this Petition until disposition of the lead disestablishment petitions to allow a full and fair presentation of the matter.

Respectfully submitted,

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of the members in the House of Representatives and *two-thirds* of the members in the entire Senate for the 51st Congress (Sisseton-Wahpeton) were still there in the 53rd Congress when the Yankton and the Nez Perce Acts were finally considered, debated and passed is significant

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No. 10-1059

In the
Supreme Court of the United States

YANKTON SIOUX TRIBE, AND
ITS INDIVIDUAL MEMBERS,
Petitioners,

v.

UNITED STATES ARMY CORPS
OF ENGINEERS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF SOUTHERN MISSOURI RECYCLING AND WASTE MANAGEMENT DISTRICT, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENT, STATE OF SOUTH DAKOTA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

ARGUMENT 1

CONCLUSION 8

TABLE OF AUTHORITIES

CASES

Rosebud Sioux Tribe v. Kneip,
430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660
(1977) 5

South Dakota v. Yankton Sioux Tribe,
522 U.S. 329, 118 S.Ct. 789, 139 L Ed.2d 773
(1998) 5

STATUTES

18 U.S C. § 1151 (a) 3, 4

18 U.S.C. § 1151 (b) 2

18 U.S C § 1151 (c) 2

S.D. Codified Laws § 46A-9 7

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, Southern Missouri Recycling and Waste Management District, formerly known as the Southern Missouri Waste Management Association, Inc., hereinafter Southern Missouri Recycling and Waste Management District, operates a Sub-Title "D" landfill located in Charles Mix County, South Dakota Originally formed in February, 1992, its members included four counties, twenty-one municipalities and the Yankton Sioux Tribe. A site was chosen for the landfill and construction, completion and successful operation of the landfill has subsequently followed. In July 1993, after an abrupt change in the leadership of the political body of the Yankton Sioux Tribe, the Tribe withdrew from the Southern Missouri Recycling and Waste Management District and then subsequently sued Southern Missouri Recycling and Waste Management District seeking to stop construction of the landfill arguing that it was sited within the limits of the boundaries of the Yankton Sioux Reservation and additionally seeking regulatory control.

ARGUMENT

The trial court ruled in favor of the Tribe. *Yankton Sioux Tribe v Southern Missouri Waste Management Dist.*, 890 F.Supp 878 (D.S.D. 1995). On appeal, a

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file Written consent of all parties accompanies this brief. No counsel for a party authored any part of this brief. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief Only the identified *amici curiae* made monetary contributions and funded the preparation and submission of this brief.

divided panel affirmed the trial court The United States Supreme Court unanimously reversed, holding that lands ceded to the federal government by the Tribe were no longer in Indian country and the Tribe's boundary had been disestablished *South Dakota v. Yankton Sioux Tribe*, 118 S.Ct. 789 (1998). The United States Supreme Court commented on the possible disestablishment of the reservation, stating. "We need not determine whether Congress disestablished the reservation altogether in order to resolve this case, and accordingly decline to do so." *Id.*, 805.

A vacating opinion was issued by the Circuit Court of Appeals for the Eighth Circuit and the case was... "remanded to the United States District Court for the District of South Dakota for further proceedings in conformity with the opinion of the Supreme Court of the United States. ." *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 141 F.3d 798 (1998). The Tribe then commenced a suit against Charles Mix County officials seeking an injunction. The District Court consolidated the two cases and issued its ruling in *Yankton Sioux Tribe v. Gaffey*, 188 F.Supp. 2d 1135, on August 14, 1998.

Since the landfill was located on "ceded" lands and thus not part of the Yankton Sioux Reservation, Southern Missouri Recycling and Waste Management District participated less actively in the case thereafter, but kept abreast of the issues and rulings.

In 2007, the district court, on remand in *Yankton Sioux Tribe v. Podhradsky*, 529 F. Supp.2d 1040 (D S.D. 2007), ruled that 37,600 acres of trust land, heretofore considered Indian country under 18 U.S.C. § 1151 (b) & (c), have reservation status. That is, that

Congress intended that the approximately two hundred individual parcels of land held in trust have a boundary around them and are to be considered as Indian country under 18 U.S.C. § 1151 (a), for now and forever.

On appeal, the Court's reasoning in *Yankton Sioux Tribe v. Podhradsky*, 577 F 3d 951 (8th Cir. S.D. 2009) and its Amended Opinion filed in *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d. 985 (8th Cir. S.D. 2010) impacts Southern Missouri Recycling and Waste Management District. Many non-Indian people and entities located in Charles Mix County negatively impacted by earlier decisions found themselves, in later decisions, to be free of the reservation status conflicts. Now some fee lands may again be at risk of being within the confines of the reservation. This unresolved issue addressing non-Indian owned fee lands retaining reservation status is what most concerns petitioner Southern Missouri Recycling and Waste Management District.

In this last case, the district court determined that all land allotted to individual Indians in the 1890's which remained in allotted status, all land taken into trust under the Indian Reorganization Act, and agency land conveyed to the tribe by virtue of the Act of 1929 was "reservation" under § 1151(a). *Yankton Sioux Tribe v. Podhradsky*, 529 F.Supp.2d 1040 (D.S.D. 2007). The court of appeals affirmed the district court, except that it vacated the district court's holding that fee lands continuously held in Indian ownership were "reservation" since there was no evidence that such lands existed. *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951 (8th Cir. 2009). In addition, the court of appeals added a new classification of Indian country,

not found by the district court or even argued by the parties. The court of appeals held that after the passage of § 1151(a), June 25, 1948, Indian allotments, Indian title to which has been extinguished, no longer left Indian country status, but retained "reservation status" under § 1151(a). The panel issued a subsequent Order stating that the language of the opinion concerning the post 1948 distinction was not in its holding and that it would excise "footnote 10 and several textual asides" to reduce any potential misunderstandings. *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 985 (8th Cir. 2010). An Amended Opinion followed incorporating those changes. *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010). The Petitions were filed in Nos. 10-929, 10-931 and 10-932 from this Amended Opinion and judgment. Southern Missouri Recycling and Waste Management District filed the Petition for Certiorari in No. 10-931.

This case, *Yankton Sioux Tribe v. United States Army Corps of Engineers* (No. 10-1059), is designated a related case. *Amici curiae* Southern Missouri Recycling and Waste Management District has not appeared previously in this case for reasons related to economy of resources and time. The issues in both cases are the same.

In order to conserve scarce resources and not unduly burden this Court with repetitious arguments, Southern Missouri Recycling and Waste Management District will not repeat arguments in the Petitions previously submitted in No. 10-929, 10-931 and 10-932. In addition, Southern Missouri Recycling and Waste Management District is aware that *amici curiae* in support of the State, County and Southern Missouri Recycling and Waste Management District Petitions in

Nos. 10-929, 10-931 and 10-932 share similar concerns. *See* interests of *amici curiae* set forth in the *Amicus Curiae* Brief of Charles Mix Electric Association, Inc. and Rosebud Electric Cooperative, Inc. in Support of Petitions for Writ of Certiorari; Brief of Cities Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, *Amici Curiae*, in Support of Petitions for Writ of Certiorari; *Amicus Curiae* Brief for Colin Soukup, Representing the Frank Soukup Family Limited Partnership, and Dan Cimpl in Support of Petitions for Writ of Certiorari, Brief of Randall Community Water District, *Amicus Curiae*, in Support of Petitions for Writ of Certiorari, and *Amicus Curiae* Brief of Wagner Community School District No. 11-4 in Support of Petitions for Writ of Certiorari, *Daugaard, et al. v. Yankton Sioux Tribe, et al.* (Nos. 10-929, 10-931 and 10-932).

Summarily, *amici* Charles Mix Electric Association, Inc. ("Charles Mix Electric" herein) and Rosebud Electric Cooperative, Inc., ("Rosebud Electric" herein) are both nonprofit rural electric distribution cooperatives incorporated in 1945 under South Dakota Law. Charles Mix Electric serves rural Charles Mix County. Rosebud Electric serves rural Gregory and Tripp Counties. The original (1858) Yankton Sioux Indian Reservation was located in what is now Charles Mix County, South Dakota. The original (1889) Rosebud Indian Reservation included what is now Gregory, Tripp, Lyman, Mellette and Todd Counties, South Dakota. These diminished reservations share a common history, especially with regards to treaty and statutory language, Indian allotments, ceded surplus lands, and subsequent white settlement. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998) and *Rosebud Sioux Tribe*

v. Kneip, 430 U S. 584, 97 S.Ct 1361, 51 L.Ed.2d 660 (1977).

The *amici* Cities of Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, also submitted a brief as *amici curiae*, in support of Petitioners State of South Dakota, Charles Mix County, and Southern Missouri Waste Management District. Five of the amici Cities, Wagner, Lake Andes, Ravinia, Dante and Pickstown, are located within the 1858 boundaries of the Yankton reservation. Every one of these *amici* Cities is situated, in whole or in part, on the former allotments now held in fee, that are squarely at issue here. Two of the *amici* Cities, Geddes and Platte, lie close to the 1858 boundaries. Each of the *amici* Cities has operated, since its founding a few years after the 1894 Yankton Act, as if no reservation boundaries exist

Amici landowners submitted a brief in support of the Petitions of the State of South Dakota, Charles Mix County and Southern Missouri Recycling and Waste Management District. The representative landowners in this matter are Colin Soukup, representing the Frank Soukup Family Limited Partnership, and Dan Cimpl. The original *amici* landowners in the trial court and United States Eighth Circuit Court of Appeals were Leonard Kreeger, Colin Soukup, representing the Frank Soukup Family Limited Partnership, Mark Van Duysen and Dan Cimpl; however, two of the original *amici* landowners requested that their name be removed from this brief due to hostile actions attributable to the Bureau of Indian Affairs (BIA) and the Yankton Sioux Tribe (YST).

Amicus curiae Randall Community Water District submitted a brief in support of the Petitions of the State of South Dakota, Charles Mix County and Southern Missouri Recycling and Waste Management District. In October 1976, the Randall Community Water District was incorporated under the laws of the State of South Dakota. South Dakota Codified Laws § 46A-9 (SDCL). The stated purpose of the Randall Community Water District was to pump, treat, and distribute potable water to rural customers and rural communities in several South Dakota counties. To date, the Randall Community Water District includes all of Charles Mix County and all of Douglas County, as well as portions of Aurora County, Bon Homme County, Brule County and Hutchinson County, all in central and south eastern South Dakota.

Wagner Community School District No. 11-4, of Wagner, South Dakota, submitted a brief as *amicus curiae* in support of the Petitions for Writ of Certiorari filed by the State of South Dakota, Charles Mix County, and Southern Missouri Recycling and Waste Management District. Wagner Community School District No. 11-4 owns real property which is a part of the approximate 8,000 acres of fee property that are directly affected by the decision rendered by the Eighth Circuit Court of Appeals in *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951 (8th Cir. Aug. 25, 2009), as amended by *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 985 (8th Cir. 2010). The Wagner School is located on part of this fee property. This fee property is within the city limits of Wagner.

CONCLUSION

Amicus curiae Southern Missouri Recycling and Waste Management District, while not agreeing this case cannot separately be resolved and affirmed, also supports the conclusion of the State of South Dakota and Charles Mix County, *amicus curiae*, to not oppose holding this Petition until disposition of the lead disestablishment petitions, to allow a full and fair presentation of the matter.

Respectfully submitted,

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